# DOCUMENT RESUME

ED 189 908 HE 012 641

| | |
|---|---|
| AUTHOR | Levenstein, Aaron, Ed.; Douglas, Joel M. |
| TITLE | Landmarks in Collective Bargaining in Higher Education. Proceedings, Seventh Annual Conference, April 1979. |
| INSTITUTION | City Univ. of New York, N.Y. Bernard Baruch Coll. National Center for the Study of Collective Bargaining in Higher Education. |
| REPORT NO | CUNY |
| PUB DATE | Apr 79 |
| NOTE | 159p. |
| AVAILABLE FROM | National Center for the Study of Collective Bargaining in Higher Education, Baruch College, CUNY, 17 Lexington Avenue, Box 322, New York, NY 10010 |
| EDRS PRICE | MF01/PC07 Plus Postage. |
| DESCRIPTORS | Arbitration; *Collective Bargaining; Contracts; *Court Litigation; *Employer Employee Relationship; Faculty College Relationship; Federal Legislation; Federal Regulation; Governance; Grievance Procedures; *Higher Education; Labor Demands; Labor Legislation; Labor Relations; Part Time Faculty; Teacher Welfare; *Tenure; *Unions |
| IDENTIFIERS | Economic Impact; *National Labor Relations Board v Yeshiva Univ; Yeshiva University NY |

ABSTRACT

The meeting of some 300 college administrators, faculty unionists, arbitrators specializing in education, and members of government agencies dealing with collective bargaining is reported in the proceedings of the Seventh Annual Conference of the National Center for the Study of Collective Bargaining in Higher Education. Topics and speakers presented include: The Economic Impact of Collective Bargaining (Basil A. Patterson); The Yeshiva Case I, II, and III (Woodley Osborne, Saul J. Kramer, and Ronald H. Schectman); A Governmental Perspective on the Funding of Higher Education (Herman Badills); Scope of Bargaining: Implications for Traditional Faculty Governance I and II (James P. Begin and Jerome Lefkowitz); What Does the Contract Cost in Dollars and Cents? (Gerald L. Dorf); The Burden of Compliance with Federal Regulations (Carol Herrnstadt Shulman); Unit Determination: Basic Criteria in Federal and State Jurisdictions (Joseph N. Hankin); The Limits of Arbitrability in Higher Education Disputes (Theodore Lang); The Tenure System I and II (Margaret Schmid and Margaret K. Chandler); Bargaining with Non-Professionals (Don Wasserman); Part-Time Faculty in Unionized Colleges (David W. Leslie); Adjuncts--Friend or Foe of Faculty Unionization? (Karen R. Schermerhorn); Legislative Landmarks--I and II (Robert Chanin and Stanley J. Bartnick); and Are There Alternatives to Collective Bargaining--I, II, and III (David Newton, Sidney Hook, and Albert Shanker). Within the sessions basic issues in the scope of bargaining were discussed such as bargaining techniques, contract administration, the scope of bargaining and the unit determination--what teachers and non-teaching personnel should be covered in the bargaining. (LC)

ED189908

# LANDMARKS
# IN
# COLLECTIVE
# BARGAINING
# IN
# HIGHER
# EDUCATION

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
NCSCBHE
Baruch College
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

**Proceedings**
Seventh Annual Conference
April 1979

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

**AARON LEVENSTEIN**, *Editor*
**JOEL M. DOUGLAS**, *Director*

National Center for the Study of
Collective Bargaining in Higher Education
Baruch College—CUNY

HE 012 641

# TABLE OF CONTENTS

Page

1. Introduction .................................................. 5
2. Joel Segall — Welcoming Address .............................. 13
3. Basil A. Paterson — Keynote Address — The Economic Impact of Collective Bargaining .............................. 15
4. Woodley Osborne — The Yeshiva Case—I ........................ 18
5. Saul J. Kramer — The Yeshiva Case—II ......................... 27
6. Ronald H. Schechtman — The Yeshiva Case—III ................. 34
7. Herman Badillo — A Governmental Perspective on the Funding of Higher Education ............................. 46
8. James P. Begin — Scope of Bargaining: Implications for Traditional Faculty Governance—I ...................... 50
9. Jerome Lefkowitz — Scope of Bargaining: Implications for Traditional Faculty Governance—II ..................... 57
10. Gerald L. Dorf — What Does the Contract Cost in Dollars and Cents? ................................... 61
11. Carol Herrnstadt Shulman — The Burden of Compliance With Federal Regulations ................................. 64
12. Joseph N. Hankin — Unit Determination: Basic Criteria in Federal and State Jurisdictions ........................... 91
13. Theodore Lang — The Limits of Arbitrability in Higher Education Disputes .......................... 101
14. Margaret Schmid — The Tenure System—I ..................... 105
15. Margaret K. Chandler — The Tenure System—II ............... 110
16. Don Wasserman — Bargaining With the Non-Professionals ........ 114
17. David W. Leslie — Part-Time Faculty in Unionized Colleges ....................................... 117
18. Karen R. Schermerhorn — Adjuncts—Friend or Foe of Faculty Unionization? ............................ 127
19. Robert Chanin — Legislative Landmarks—I .................... 133
20. Stanley J. Bartnick — Legislative Landmarks: California—II ............................................ 141
21. David Newton — Are There Alternatives to Collective Bargaining?—I ................................ 145
22. Sidney Hook — Are There Alternatives to Collective Bargaining?—II ............................... 150
23. Albert Shanker — Are There Alternatives to Collective Bargaining?—III .............................. 155

# 1. INTRODUCTION

Some 300 college administrators, faculty unionists, arbitrators specializing in education, and members of government agencies dealing with collective bargaining gathered in New York for the Seventh Annual Conference of the National Center for the Study of Collective Bargaining in Higher Education. Dominating their discussions was the decision of the Second Circuit Court of Appeals in the *Yeshiva University* case which had barred faculty in private institutions from the protection of the National Labor Relations Act.

At the beginning of 1979, the National Center had reported that 382 of the nation's higher education institutions were engaged in collective bargaining. For the most part they were public institutions – 302, to be exact – and would not be affected directly by the decision. But the consensus seemed to be that if the private, non-profit campuses remained exempt from the national labor law, the government colleges and universities, now bargaining under the state public employment laws, would eventually be able to argue that their faculties too were managerial or supervisory and should be denied mandatory collective bargaining rights. It was felt also that the 80 private institutions now dealing with faculty associations would resist renewals or new negotiations when their present contracts expire. At the same time, however, in states that had not yet enacted bargaining laws covering faculty in public institutions, union pressure was gaining ground – most notably in California with its enormous higher education system.

## Taking Stock

It was an appropriate time for both sides, along with the neutrals, to consider the landmarks that had been reached so far in the development of campus unionism. As can be seen from the papers that were presented and that are reproduced here, the academy has much to debate. Obviously the *Yeshiva* decision itself speaks variously to partisan interests. The conference was fortunate in that it could hear the legal issues presented by three attorneys, two of whom had argued the case both before the National Labor Relations Board and the Court of Appeals and who were scheduled soon to present the controversy to the Supreme Court.

Much attention was given, inevitably, to the new environment in which the institutions of higher education now function. Our colleges and universities, which until fairly recently were regarded as a "growth industry," are facing serious contraction as a result of several pressures – a decline in the number of college-age youth, reducing "the market"; public displeasure with the educational system in general, due partly to the campus disruptions of the 1960s and early 1970s, and partly to the public's conviction that our schools generally are failing "to deliver"; and the mounting clamor for the curtailment of government expenditures, especially in education.

The public these days is showing less sympathy for the burdens borne by administrators and faculties who as a group are wrestling with pared budgets, and as individuals with the unbalancing of their personal budgets by inflation. The result is felt by all the participants at the negotiating table, and their behavior – cooperative or adversarial – is at the core of what lies ahead in the bargaining scene.

**National Policies**

Issues of national policy, which is in a constant state of evolution as every student of collective bargaining has observed, figured prominently in the conference deliberations. The problem of affirmative action and other forms of government presence in the groves of academe received considerable analysis and roused much partisanship. Even more broadly, there was a new interest in the general subject of how government regulation, once considered only the bugaboo of business, has come to affect colleges and universities. Aside from the familiar issue of whether academic quality suffers from the intrusions of the Department of Health, Education and Welfare, the economic pressure has brought a concern about the cost impact of regulations flowing from legislation like the Social Security Act, ERISA (the Employee Retirement Income Security Act), and the recent amendments to the Age Discrimination in Employment Act which will ultimately raise the mandatory age of retirement to 70 and prolong the service of higher-priced faculty.

In the realm of national policy it is apparent that interest has spurted in the issues of due process for faculty members without tenure – matters that have been dealt with by the Supreme Court in the Roth and Sindermann cases. The courts generally have been loath to interfere with academic judgments, and contracts have tended to respect such judgments as an area of exclusive management prerogative. But this approach was developed in a period of expanding employment opportunity in higher education; it will be under increasing scrutiny as contraction proceeds and the stakes become higher.

So too an increased national concern about competence and accountability in teaching generally has had repercussions for the venerable institution of tenure, originally born out of a desire to protect academic freedom. This issue commanded intense attention and spurred much controversy.

**Practical Challenges**

As against these matters of policy, the nuts-and-bolts aspects of the bargining scene yielded up valuable material from the experience of faculty negotiators, administration spokesmen and neutrals. Such items included these areas:

1. Unit determination – what teachers are covered and what non-teaching personnel may be included in the same unit with the instructional faculty.

2. The ever troublesome question of scope of bargaining, with emphasis on the difficulties involved in drawing the line between *wages, hours and other terms and conditions of employment,* the subject matter of collective bargaining, and issues of *governance and educational policy,* usually reserved for administration or for faculty senates.

3. Techniques of bargaining, including such items as costing the contract proposals; negotiating about part-timers; dealing with non-professional employees.

4. Contract administration, involving grievance procedures, determining arbitrability, defining the authority of the arbitrator and the types of remedies he is free to devise.

The concluding session focussed on a question that is bound to be of enduring interest: Are there alternatives to collective bargaining? The issue was examined from three distinctive standpoints: the views of a leading figure in American philosophy, of a nationally known vice-chancellor for labor relations in a major Eastern university, and of an outstanding national leader in teacher unionization.

**The Program**

Regrettably, not all the participants were in a position to provide a written text; wherever taping of the discussion was possible, an edited transcript has been included in these *Proceedings*. For the record, the sessions were organized, as indicated below on the basis of questions suggested in advance to the speakers and the authors of various papers, though they were advised to take whatever direction they considered most appropriate in the light of their own experience and interests.

**Monday morning, April 23, 1979**

9:00 *INTRODUCTION*

Joel M. Douglas, Director, NCSCBHE

*WELCOME*

Joel Segall, President, Baruch College

9:45 *KEYNOTE*

*"THE ECONOMIC IMPACT OF COLLECTIVE BARGAINING"*

Hon. Basil A. Paterson, Secretary of State, State of New York

10:30 *Plenary Session–JUDICIAL LANDMARKS: HAS THE YESHIVA DECISION ENDED COLLECTIVE BARGAINING IN THE PRIVATE COLLEGES?*

Does the decision that Yeshiva faculty serve in a managerial capacity and are thus exempt from NLRA coverage mean that private institutions need not bargain with academic unions?

The issues are presented by the attorneys who argued the case before the 2nd Circuit Court of Appeals.

Speakers: Saul G. Kramer, Esq., Proskauer, Rose, Goetz & Mendelsohn, N.Y. (Attorney for Yeshiva University)

Ronald H. Shechtman, Esq., Gordon & Shechtman, N.Y. (Attorney for Yeshiva University Faculty Association)

Woodley B. Osborne, Director of Collective Bargaining and Associate Counsel, AAUP

Moderator: Sidney Herman, Dean Faculty & Staff Relations, Northeastern University

12:15 *Luncheon*

*A GOVERNMENTAL PERSPECTIVE ON THE FUNDING OF HIGHER EDUCATION*

Speaker: Hon. Herman Badillo, Deputy Mayor, City of New York, Former Member of Congress

**Monday afternoon, April 23, 1979**

2:15 *SMALL GROUP SESSIONS–"LANDMARK ISSUES"–Part 1*

Group A: *SCOPE OF BARGAINING; IMPLICATIONS FOR TRADITIONAL FACULTY GOVERNANCE.*

Recent legislation and decisions affecting mandatory, prohibited and permissive bargaining subjects.

Speaker: James Begin, Professor of Industrial Relations, Rutgers University

Discussant: Jerome Lefkowitz, Deputy Chairman, New York State Public Employment Relations Board

Moderator: Aaron Levenstein, Associate Director, NCSCBHE

Group B: *WHAT DOES THE CONTRACT COST IN DOLLARS AND CENTS?*

A discussion of economic concepts and practical methodology for a period of financial exigency.

Speaker: Gerald L. Dorf, Esq., New Jersey State League of Municipalities

Discussant: Joel M. Douglas, Director, NCSCBHE

Moderator: Robert W. Miner, Director of Higher Education, NEA

Group C: *THE BURDEN OF COMPLIANCE WITH FEDERAL REGULATIONS.*

How federal requirements affect the university–laws and regulations on discrimination, retirement, funding, social security.

Speaker: Carol H. Schulman, Research Associate, ERIC Clearinghouse on Higher Education

Discussant: Bernard Mintz, Acting Vice President for Academic Affairs, William Paterson College of New Jersey

Moderator: Michael McKeown, Director of Higher Education, Indiana State Teachers Association.

Group D: *UNIT DETERMINATION: BASIC CRITERIA IN FEDERAL AND STATE JURISDICTIONS.*

Trends in the exclusion of supervisory and managerial personnel, faculty in professional schools, multicampus units, support professionals.

Speaker: Joseph N. Hankin, President, Westchester Community College

Discussant: Robert Nielsen, Director Colleges and Universities Dept., AFT

Moderator: Clyde J. Wingfield, Provost and Executive Vice President, University of Miami

Group E: *THE LIMITS OF ARBITRABILITY IN HIGHER EDUCATION DISPUTES.*

Distinction between grievable and arbitrable issues; defining the authority of the arbitrator; remedies available in arbitration.

Discussants: Theodore H. Lang, Arbitrator, Professor of Education, Baruch College; former Director, NCSCBHE

Julius J. Manson, Arbitrator, Professor Emeritus, Baruch College

Samuel Ranhand, Arbitrator, Professor of Management, Baruch College

**Tuesday morning, April 24, 1979**

9:00 *SMALL GROUP SESSIONS–LANDMARK ISSUES–Part 2*

Group F: *THE TENURE SYSTEM: ARE OTHER APPROACHES POSSIBLE THAT WILL STILL PROTECT ACADEMIC FREEDOM AND ASSURE SECURITY FOR QUALITY FACULTY?*

Cyclical tenure, renewable contracts and other options will be discussed.

Speaker: Margaret Schmid, President AFT Faculty Federation, Northeastern Illinois University

Discussant: Margaret Chandler, Professor of Business, Columbia University

Moderator: Thomas Mannix, Asst. to the President, Western Michigan University; former Acting Director, NCSCBHE

| | |
|---|---|
| Group G: | *AFTER BAKKE–WHAT?* |
| | How has the Supreme Court decision affected collective bargaining and university policies? What will be the effect of the new EEOC regulations? |
| Speaker: | Miro Todorovich, Professor, Bronx Community College, Coordinator, Committee on Academic Non-Discrimination and Integrity. |
| Moderator: | Esther Liebert, Affirmative Action Officer, Baruch College |
| Group H: | *THE SUPREME COURT'S VIEW OF DUE PROCESS FOR COLLEGE FACULTY.* |
| | What has been the impact of the Roth and Sindermann cases? Will "just cause" become a criterion in non-reappointment? |
| Speaker: | Joyce Barrett, Grievance Officer, Baruch Chapter, PSC/AFT. |
| Discussant: | Norbert Musto, UniServe Director, Central Michigan Faculty Association. |
| Moderator: | Richard M. Millard, Director Post-secondary Department, Education Commision of the States. |
| Group I: | *BARGAINING WITH THE NON-PROFESSIONALS.* |
| | An update on the unionization of blue collar and clerical campus personnel. |
| Speaker: | Don Wasserman, Director of Research and Collective Bargaining Services, AFSCME |
| Discussant: | Robert D. Helsby, Director, Public Employment Relations Services, former Chairman, Public Employment Relations Board of New York State. |
| Moderator: | Theodore H. Lang, Professor of Education, Baruch College; Former Director, NCSCBHE. |
| Group J: | *ADJUNCTS–FRIEND OR FOE OF FACULTY UNIONIZATION?* |
| | Do part-timers represent a "cheap labor" answer to economic stringency? Is separate organization by adjuncts inevitable? How is the issue dealt with in current bargaining? |
| Speakers: | David W. Leslie, Professor of Education, University of Virginia in Charlottesville. |
| | Karen Schermerhorn, President, Faculty Federation of the Community College of Philadelphia, AFT. |
| Moderator: | David Newton, Vice Chancellor, Long Island Univ. |

11:00 *Plenary Session–LEGISLATIVE LANDMARKS: AN UPDATE ON THE LEGAL ENACTMENTS IN THE VARIOUS JURISDICTIONS THAT AFFECT HIGHER EDUCATION, WITH SPECIFIC EMPHASIS ON AGENCY SHOP AND NEW TECHNIQUES OF IMPASSE RESOLUTION.*

Speaker: Robert Chanin, Esq., General Counsel and Deputy Secretary, NEA.

Moderator: Stanley J. Bartnick, Director of Employee Relations, the California State University and Colleges.

**Tuesday afternoon, April 24, 1979**

12:30 *LUNCHEON*

Symposium: ARE THERE ALTERNATIVES TO COLLECTIVE BARGAINING?

A noted philosopher, a union leader, and a university administrator present their views of collective bargaining in higher education, to be followed by full-length discussion from the floor.

Participants: Sidney Hook, Professor Emeritus, New York University, Hoover Institution, Stanford University

David Newton, Vice Chancellor, Long Island University

Albert Shanker, President, AFT, AFL-CIO

Moderator: Aaron Levenstein, Associate Director, NCSCBHE

3:00 *SUMMATION:*

Joel M. Douglas, Director, NCSCBHE

**A Word About the National Center**

Whatever differences are suggested by the fact of collective bargaining in higher education, one premise enjoys unanimity: the diverse interests can best be accommodated if the essential objective data are readily available to all the parties. This is the purpose of the National Center. Its continuing growth is evidence that both administration and faculty representatives have come to recognize that the Center is an invaluable resource, not only as an educational medium in its own right but as a repository for records, contracts, awards and other basic material. This has been possible only because both administration and faculty unions – AAUP, AFT, NEA and unafffiliated groups – have cooperated in building the Center's library and in providing participants and speakers for conferences, workshops and seminars. There is a shared conviction that stability and progress in higher education bargaining will be enhanced by this academic meeting ground.

Those who are unfamiliar with the Center will want to know about its various activities which include the following:

- The two-day Annual Spring Conference.
- Publication of the proceedings of the Annual Conference, containing texts of all major papers.
- Issuance of an Annual Directory of Faculty Contracts and Bargaining Agents.
- Bibliography of Collective Bargaining in Higher Education.
- The National Center Newsletter, issued five times a year, providing in-depth analysis of trends; current developments; major decisions of courts and regulatory bodies; updates of contract negotiations and selection of bargaining agents; reviews and listings of publications in the field.
- Monographs – complete coverage of a major problem or area, sometimes of book length.
- Regional workshops, using a hands-on format to provide training in subjects like negotiating a contract, grievance-processing and arbitration, implementation and administration of contracts.
- Elias Lieberman Higher Education Contract Library maintained by the National Center, containing more than 350 college and university collective bargaining agreements, and important books and relevant research reports.
- Contract Data Bank maintained jointly with McGill University, providing for retrieval and analysis of specific clauses.
- Depository of arbitration awards in higher education, housed at the National Center and established with the cooperation of the American Arbitration Association.

## Acknowledgements

The continuing growth of the Annual Conference, both in number of participants and in intellectual stature, is the result of widespread support. Planning of the content is the product of suggestions made by the Distinguished National Advisory Committee and the in-house Faculty Advisory Committee of Baruch College. Along with the staff, they are responsible for choosing the specific themes and designating the individuals who are invited to deal with them.

As the reader of these *Proceedings* will see, the conference owed a great deal to the speakers who obviously devoted much time, energy and thought to the preparation of their papers. Not reflected in these pages but of major importance was the contribution of the moderators and the leaders of the small-group sessions who, with learning, wit and skill, guided the discussions. Also to be thanked are the members of the audience in both the small groups and the plenary meetings who asked provocative questions and offered additional insights out of their own experience.

The wisdom of basing the National Center at Baruch College is once again confirmed by the smoothness, indeed grace, with which the administrative and secretarial personnel handled the multitudinous details involved in communicating with the speakers, registering the conferees, distributing the conference portfolios, organizing the small group assignments, arranging the meeting rooms, and providing the innumerable personal courtesies to which the members and guests of the National Center are entitled.

As in the past, the staff has earned personal recognition for enthusiastic and effective service. Ms. Molly Garfin, the Center's librarian and the author of much in its publication list, played a major role in the organization of the resource material distributed to the conferees. Some of the material in these *Proceedings* would have been lost without the cooperation of Professor Lawrence Arnot and Mr. Michael Lydon of the Baruch College Audio-Visual Department, Mr. Alan Pearlman of the Department of Education, Mr. Robert Seaver and Mrs. Suzanne Cooperman of the College Relations Department. The tapes were painstakingly transcribed and the texts prepared by Mrs. Ruby Hill and Mrs. Prudence Gill of the National Center's staff and the staff of the Baruch College Word Processing Center headed by Ms. Lucy Silva. Most important, the Center and the conferees owe a great debt to Mrs. Evan G. Mitchell, the Executive Assistant to the Director and the Production Director of Publications, who bore the brunt of coordinating the logistics of the conference.

*–Aaron Levenstein*

## 2. WELCOMING ADDRESS

Joel Segall

*President, Baruch College*

On behalf of Baruch College, I want to welcome all of you to this – the Seventh Annual Conference on Collective Bargaining in Higher Education.

This is the second time I have had this privilege. Last year I felt compelled to disclaim any responsibility for the success of the meeting since I had only been at Baruch for ten months. Now a year later – it is 22 months – and while I can't take much more of the credit for this conference – that belongs to Joel Douglas and his colleagues – I can say that I have become more cognizant of the significance of the Center's work, more supportive of its activities, and more pleased that it is housed in our institution.

None of us here can doubt that the collective bargaining process is becoming an increasingly critical element in college and university administration. Num-

12

bers tell part of the story: 130,000 postsecondary faculty and professional staff members carry a union card today out of a total of 665,000. The number of schools with unionized faculty and support staff members has increased dramatically over the past ten years and continues to increase. And this in a period in which the proportion of union members in the total workforce has dropped.

Those figures are important – but more important is a change in the climate in which the negotiating process is taking place. When the Center held its first conference here in 1972, academics were still living in the days of wine and roses. Enrollments, Federal support, state support, and private contributions all were increasing. The central issues at the bargaining table at most schools were what seem in retrospect to have been the easy ones – how to distribute the bounty fairly and how to make sure no one including the institution itself got shortchanged.

Now, as we know too well, the situation has changed. For some – especially those of us who work in this city – the change came sooner; for others it is only beginning to take place. But to greater or lesser degree, for most schools – those represented here and the others – the handwriting is on the wall. The combination of demographic change, Proposition 13 fever, and continuing doubt about the economic value of a college degree spells, if nothing else, an end to the era of abundance and the beginning of what can be characterized as a period of

Many of those decisions will be made at the bargaining table, but they will be made within the constraints imposed by the marketplace, by accrediting bodies, and by political choices made in Washington and in the state capitals. It is important that we come to understand, not just the dynamics of the bargaining process itself, but the way in which the larger context in which we function affects the process. At conferences like this one, and in other ways throughout the year, the National Center works to foster that understanding. It works, as well, to broaden the base of understanding within academia of specific issues that come to the fore that affect, directly or indirectly, the nature of the negotiating process. The *Yeshiva* decision certainly represents one such issue; depending on your point of view, the precedent established in that decision, if allowed to stand, threatens – or promises – to curtail significantly the role of collective bargaining in private colleges and universities. The ultimate implications of *Yeshiva* for public higher education may be not less significant. Appropriately, the conference will devote a session to the *Yeshiva* case; like most of you I will be listening closely to see what guidance the participants can give us.

And I will be looking forward, with great interest, to the conclusions of the other sessions. I have reviewed each of the topics; each suggests questions that have been on our minds and are on the minds of colleagues across the nation.

We are honored to have with us two eminent New Yorkers; one will speak this morning and the other this afternoon. Both Basil Paterson and Herman Badillo are friends of education in general and higher education in particular. We welcome them; each of them will be able to elaborate on that larger context of constraints alluded to a moment ago.

Rather than take any further time away from a valuable program, I again extend my greetings to all of you – with a special nod to those former Baruchians who have returned to Manhattan.

# 3. KEYNOTE ADDRESS—THE ECONOMIC IMPACT OF COLLECTIVE BARGAINING

**Basil A. Paterson**

*Secretary of State, New York*

I am pleased indeed to be part of this Seventh Annual Conference on Collective Bargaining in Higher Education.The National Center for the Study of Collective Bargaining in Higher Education is a respected institution which provides a forum for the analysis of a critical problem. The workshops run by the Center – in negotiation, grievance handling and arbitration – impart vital skills to those charged with labor relations at our colleges and universities. The Department of State has begun to survey the needs of local governments throughout the state in the area of labor relations, and we are finding an urgent demand for the same kind of training that the Center provides. We hope to learn from your experiences and those of others as we build a program to help town, village and county officials meet their responsibilities in collective bargaining.

Collective bargaining is a relatively new phenomenon in colleges and universities, as it is in local governments. I think it is safe to say that collective bargaining is an established fact of life for those dealing with local government employees; the future of collective bargaining in our institutions of higher education is less certain. There are indications of its vigor, but simultaneously we see events which may be signaling its decline.

## The Future of Bargaining

Among the reasons to believe that collective bargaining will survive and expand in this area is the steadily increading number of campuses with collective bargaining agents. Another is the apparently favorable perception of collective bargaining among our faculty. In 1975 Seymour Martin Lipset reported to this conference that three-quarters of the faculty surveyed in a study of this subject believed that collective bargaining produces higher salaries and benefits. Four-fifths of them believed that it improves opportunities for women. Such perceptions achieve a life of their own, and give unions strength.

A third factor seeming to betoken genuine union strength in higher education are some recent apparent successes. There is, nonetheless, a basic problem in faculty unionism which remains to be resolved. It may be a problem which can never be resolved in favor of traditional union organization of faculties. I am speaking, of course, of a problem to which this conference has, over the years, devoted a great deal of attention: the conflict between the concepts of trade unionism and the traditional means of governance in colleges and universities. This dilemma, as we are reminded by the Second Circuit Court of Appeals decision in the Yeshiva University case, is complex and will not soon be resolved. This decision will receive a great deal of attention during this conference, I'm sure.

## Are Faculty Employees?

You are all most certainly aware of the outlines of the controversy. At issue was the eligibility of the full time faculty at Yeshiva University for collective bargaining under the National Labor Relations Act. The university took the position – before the National Labor Relations Board and before the Court – that full-time faculty members are supervisory or managerial personnel and are therefore *not* employees within the meaning of the National Labor Relations Act. The university's position was based upon the collegial nature of Yeshiva's govermance.

The N.L.R.B. rejected the university's arguments and held the faculty to be employees covered by the Act. Subsequent events took the parties, including the N.L.R.B. which had by then issued a complaint against the university for refusal to bargain, to the courts. The Second Circuit held that under long-established standards, the full-time faculty has managerial status. The Court would not enforce the Board's order that the university bargain with the faculty. The Court recited faculty responsibilities which are traditionally collegial as the basis of its holding: recommendations on the hiring, promotion, salary, and tenure of the faculty; adoption of standards of admission, the grading system and graduation requirements.

Although this decision has undoubtedly raised the hopes of many who see faculty unionism as incompatible with the basic concept of a college or university, the implications of the decision remain to be seen. It is a thoughtful and well-written opinion which provides much food for thought – and debate. Whatever else it may mean, the decision does mean that the issue is alive and kicking. It does not mean that collective bargaining at institutions of higher education is dead. The care with which the Court confined its decision to the facts of the case suggests the necessity of continuing litigation on a case-by-case basis. And whatever implications it may have for institutions under the jurisdiction of the N.L.R.B., of course, it leaves open entirely the question of institutions under a state public employment bargaining law like New York State's Taylor Law.

If the Yeshiva case is a harbinger of the future, our institutions will return to the traditional methods of determining salaries, of dealing with grievances.

If, however, collective bargaining survives in the arena of higher education, colleges and universities must be prepared to meet the challenge.

## Unique Problems

In every industry there are, in the early rounds of bargaining, unique problems to be faced. In higher education, once the right and obligation to bargain is established, the problem represented by the Yeshiva case will not just disappear. The question will remain: What areas of decision-making previously under "shared authority" will become subjects for bargaining? Until faculties begin to feel the restrictions that unionization places on their own authority as well as the administration's there will be continuing pressure to expand the scope of bargaining.

Institutions which choose to challenge this expansion must do so with the most competent professional help. There is a temptation in the early phases of a bargaining relationship to try to "do it yourself." An administration with little labor relations experience may be faced with such pressures. It is vital to understand when you are opening up a new area for negotiations, and to know to the extent possible what moving into that area means. The cost of competent advice is high. But the cost of inexperience is ultimately much higher.

Preparedness for bargaining is all-important. The first few rounds of bargaining between the institution and the bargaining agent set patterns which will last through many contracts. The greatest danger is that undesirable and hard-to-break patterns will be set inadvertently. A great deal of experience is required to recognize the implications of *how* the bargaining is conducted. Equal sophistication is needed to see the implications of each agreement for the next, for other bargaining units, to see the "cost" of non-economic items. Great caution and foresight are required to avoid entanglement in past practices and rules and regulations which may become, once bargaining begins, terms and conditions of employment unless they are "bargained out."

### Complexities of Negotiation

The *sine qua non* of successful bargaining, in my view, is being able to "read" unions and union leadership and to anticipate their problems and their needs. Only experience teaches this. The early days of union organization, especially in an independent unit, are characterized by instability and internal struggles. Neophyte union organizations are in a state of flux. This complicates negotiations.

A union's position in negotiations may reflect internal problems which must be resolved before the negotiations can be concluded. There may be an on-going struggle for control among the faculty, tenured and untenured, administrative services, student services and librarians where all are in the same union. The union leadership may not possess the skills necessary to deal with its internal problems. It may be wanting in across-the-table skills and confidence. Especially in professions where trade unionism is not a tradition, this may be a serious problem.

Ken McFeeley, the former president of the New York City Patrolmen's Benevolent Association described his own dilemma poignantly: one day he was riding around in a patrol car, a cop on the beat; the next, he was having lunch with the mayor, winner of a union presidential election preparing to negotiate over half a billion dollars in salaries and fringe benefits.

Another problem faced by a union in the early stages – which complicates negotiations, sometimes in the most unpleasant ways–is the need to prove itself as an effective representative for the employees who are supporting it. Militancy is the rule rather than the exception with newly-formed union organizations. The rhetoric which flows from unstable organizations may be particularly strident. Learning to deal with the rhetoric is one of the most valuable skills a negotiator can acquire.

### Organizational Needs

Being sensitive to the needs of the union organization is an advantage when the best strategy is *creativity*. The measure of success in your creative propositions will be their sensitivity to the needs of the union organization. The union may overreach, for example, and lack the skills or the authority with its membership to retrench. Your understanding of organizational problems will enhance your opportunity to move the negotiations constructively.

But what about the fact that there is less and less money? that competition for public monies is increasing? The Regents' progress report for 1978 shows that in recent years approximately twelve per cent of state revenues in New York have been devoted to education. That share of the state pie is dramatically illustrated in the following figures: the cost to the state per year for a student is $3,000. Keeping a prisoner costs the state $12,000. And caring for a mentally ill person costs $24,000 per year. It can hardly be gainsaid that educators feel it is time for their share of the pie to be increased. And yet the likelihood of such a readjustment of government's investments in services to the public can only be diminished in a troubled economy.

As the Regents' report points out, as costs inflate more rapidly in these other areas, the pressure will increase to give them a larger share of the pie. The pressure generated by the scarcity of public monies is the third party at every bargaining table where the employer spends government money. In full-blown crisis this third party may be the most demanding presence at the table. New York City *and its unions* discovered in the last two rounds of bargaining what crisis really means to the bargaining process.

Ultimately in collective bargaining there should be no winners and no losers. I hope that our institutions of higher education will be spared some of the harsher lessons dealt to the city and its unions over the four years, but I am sure they will not escape entirely the particular collective bargaining problems which result from short dollars.

More than ever before, in any arena where collective bargaining takes place, we need skilled and sensitive negotiators, with skilled and sensitive principals.

## 4. THE YESHIVA CASE—I

Woodley Osborne*

*Former Directory of Collective Bargaining, and Counsel, AAUP*

A colleague of mine once observed that the National Labor Relations Act is, among other things, an invitation to hypocrisy. What he meant was that the Act's key requirement of "good faith bargaining" between union and employer frequently prompts representatives of labor and management to mask their true attitudes towards each other, lest the hostility which may in fact motivate them be exposed to the Labor Board with consequences they would rather avoid.

While I do not for a moment suggest that any of the parties in the *Yeshiva* case[1] are hypocrites, it nonetheless seems to me that the Court of Appeals decision adds a new dimension to the "hypocrisy theory." For in an otherwise ordinary dispute over employee power – and that, after all, is what an election petition is principally about – we find the employer insisting that the employees run the place, while the employees simply seek the right to bargain with their employer as relative equals. Usually one would expect the opposite. That is, usually one would expect the employees to be asserting a certain prerogative and the employer to be resisting their claim. This reversal of roles which is sanctioned – indeed mandated – by the *Yeshiva* decision is more than a curiosity. In my judgement, it demonstrates the fundamental incorrectness of the decision. For the law is distorted by rules which force litigants into unnatural and necessarily disingenuous positions. The *Yeshiva* decision is a prime example of this proposition.

---

*The views expressed by the author are personal and not necessarily those of organizations he has represented. Footnotes for this paper will be found on pages 26 & 27.

## Managerial Responsibility

In any event, the *Yeshiva* decision remains an anomaly. For although the Labor Board has passed on many claims of managerial status over the years,[2] it has never had a case where the employer contended that the employees sought by a union literally operated the enterprise. And only once, outside of the higher education context, has the Board faced an employer's claim that an entire group of employees sought by a union were managerial.[3] In fact, in none of the many Board cases on the subject have individuals ordinarily thought of as management been at issue. Rather, the Board has dealt with such individuals as company buyers, with authority to make substantial purchase commitments in behalf of their employers;[4] department managers, with some discretion to act for and bind the company;[5] or production expediters, with some responsibility, as their title suggests, for keeping production moving on schedule.[6] The Board has never, however, been asked to certify a unit of company vice presidents or other such clearly managerial personnel.[7]

One is tempted to confine one's comments on the *Yeshiva* decision to some rather fundamental observations. The Court of Appeals' conclusion that the entire complement of an employer's "production" employees may be managerial runs against ordinary common sense. To put it baldly, some one simply must be running the place – or at least have that responsibility. And it defies all logic to conclude that this responsibility is vested in the entire complement of individuals employed by the University to teach and carry out research. As a college administrator said a long time ago, resisting incipient faculty claims for a greater role in governance, "No way has yet been found to play the cello or the harp and at the same time direct the orchestra."[8] That does not mean that one can't play the cello and, together with one's colleagues, have or seek an important *role* in determining the direction of the orchestra. But the primary responsibility for directing the orchestra must reside elsewhere.

In stressing this commonsense view of the *Yeshiva* decision, I recognize that I am oversimplifying matters considerably. Nonetheless, there is a fundamental truth of the matter which ought not be obscured by sophisticated arguments

18

about the significance of the faculty role in governance: faculty are in an employment relationship with their institutions. They are employed to teach and carry out research. They are paid salaries which are set and altered by the administration and governing boards of their institution. And they are, increasingly, concerned about their job security.[9] Like many groups of employees, faculty seek, individually and collectively, a measure of influence on their employer at least sufficient to enable them to carry out their work autonomously, in congenial surroundings, and for reasonable compensation.[10] This effort on the part of faculty has in the past met with considerable success, at least at many of those institutions characterized as elite – or mature, to use the current euphemism. Faculty influence over a wide range of important matters of educational policy has become practically decisive at many such institutions.

And here I come to what for me is the heart of the matter: the fact of this great faculty influence (and here I ignore the persistent dispute over the extent of that influence) may provide a good reason for faculty at some institutions to avoid collective bargaining – viewing it as at best superfluous. It may provide a valid basis for arguing that collective bargaining would be affirmatively harmful to existing collegial relationships. But, in my view, it provides no basis for concluding that faculty may not choose to engage in collective bargaining under the protection of the National Labor Relations Act.

When there is a dispute over employee influence in a plant or factory, the key remedy under the National Labor Relations Act is a Board-supervised representation election. The employer is free to argue, among other things, that the employees are "doing all right," and that they do not need collective bargaining. If he can convince a majority, he wins the argument. Labor Board election statistics show employers to be successful in these arguments at least half the time. But until the *Yeshiva* decision no one seriously suggested that the question of whether or not the employees are "doing all right" should be decided by the Labor Board or by a Court of Appeals. I see no reason that faculties should be barred from concluding that their influence over matters of academic governance is no longer sufficient to fully protect their interests. And it seems to me wrong – and ultimately fruitless – to take the right to make that decision away from the faculty.

It is also well to remember that, even at those institutions marked by a heavy faculty role in governance, faculty influence can vary widely depending on a variety of factors which may impinge on the decision-making process and depending also on the prevailing attitudes and temperament of an institution's administration and governing board.[11] Moreover, it is widely recognized that the increased faculty role in governance which has occurred since World War II has resulted from increased faculty bargaining power as much as from any altruism on the part of higher education's governing authorities.[12]

Recognizing that the law does not always follow the path of common sense, let me turn to an analysis of the decision itself. I confine my observations to the Court of Appeals' conclusion that the faculty at Yeshiva are "managerial employees." With regard to the Court's conclusion that the Yeshiva faculty are supervisors as well, suffice it to say that I believe that conclusion to be patently incorrect. The definition of supervisory employees is set forth in Section 2(11) of the National Labor Relations Act and is expressly extended only to *individuals* with authority over non-supervisory employees. As such, the definition simply cannot be made to cover an entire and discrete group of employees whose alleged supervisory authority is exercised, for all intents and purposes, entirely within the group. Those few Courts of Appeals which have passed on this question have generally agreed with this seemingly inescapable conclusion *cf. Mourning v. NLRB*, 559 F. 2d 768 (D.C. Cir., 1977).

## The Court Decision

The Court of Appeals analyzed the governance patterns of the several components of Yeshiva University and concluded that the faculty, frequently operating through committees chaired by administrators, regularly made recommendations to the University administration and governing board on a number of important matters: the reappointment, appointment, promotion and tenure of their colleagues; curriculum matters; grading and degree requirements; and even, according to the Court, the level of tuition to be charged. The Court further found that the faculty recommendations on these matters were ordinarily followed by the administration and governing board. It concluded from this that the Yeshiva faculty were effectively "operating the enterprise."

There is substantial room to take issue with the Court of Appeals' factual findings and conclusions.[13] However, for purposes of these observations, I shall take it as factually correct that the Yeshiva faculty regularly made recommendations to its administration and governing board on a number of important matters and that those recommendations were ordinarily followed. The question, then, is whether, on these facts, the faculty at Yeshiva University may properly be labeled "managerial employees" as defined by the Labor Board, and thereby barred from bargaining under the Act's protection.

## Defining "Managerial Employees"

The managerial employee exclusion appears nowhere in the National Labor Relations Act. It is a creation of the Labor Board, albeit one which has been confirmed by the Supreme Court as consistent with the intent of Congress in passing the Taft-Hartley Amendments of 1947.[14] Early on, the Labor Board treated specially certain employees with substantial responsibilities to their employer which distinguished them from their "rank-and-file" colleagues. The Board reasoned that to include such employees, for example, buyers, store managers and production expediters, in bargaining units with their rank-and-file colleagues would create a conflict of interest situation which the Board sought to avoid under its "community of interest" standards for determining appropriate bargaining units.[15] The Board frequently labeled the excluded employees "managerial," although in its early decisions it never held that they were entirely prohibited from engaging in collective bargaining under the Act.[16] Refining its definition in subsequent decisions, the Labor Board now defines "managerial employees" as "those in executive-type positions" who act from a position closely "aligned with management as [its] true representatives," and who possess substantial and independent discretion to "formulate and effectuate management policies."[17]

In my judgment, it is impossible to square the Labor Board's definition of "managerial employees" with the holding of the Court of Appeals, even with the factual concessions I made at the outset. What the Court of Appeals held, reduced to its simplest terms, was that the Yeshiva faculty wielded a substantial amount of influence on the decisions of the University's administration and governing board and that this influence was enough to make them "managerial employees." But neither the Labor Board nor the courts have ever held that employee influence on management is enough, without more, to support a finding of managerial status sufficient to oust those employees from the Act's protections.[18]

In my judgment, there are good reasons for this. One of the central purposes of the National Labor Relations Act is to afford to American employees the opportunity, through collective bargaining, to enhance their influence on their employer. In furtherance of this central aim, the Act has established a "process which insures that employees as a group can express their opinions and exert their combined influence over the terms and conditions of their employment."[19] Fundamental to this process are the related concepts of employee free choice and the "private ordering" of the employer-employee relationship.[20] The Act leaves to the employees themselves the choice of whether or not to engage in collective bargaining and further leaves the parties free to order their own relationships without government interference. Although the Act compels bargaining only over the so-called mandatory subjects of bargaining, those matters falling within the scope of "wages, hours, and other terms and conditions of employment," the parties are perfectly free to bargain over other matters as well, and the law will both respect the terms of the agreement reached and not intrude into it.[21]

**Employee Participation in Management**

This fundamental purpose – the encouragement of "free collective bargaining" – necessarily presumes a malleable definition of management prerogative, a definition which changes with the dynamics of the bargaining process and the judgment of the parties themselves as evidenced by the collective agreement. It is important to stress, parenthetically, that even in unorganized industries employee influence on management policies is by no means unknown. And in fact such influence on management is perfectly compatible with modern managerial theories. As one commentator has observed:[22]

> The new managerial theories postulate that the employee's intimate knowledge of actual conditions at his work place puts him in a position to contribute constructively to the organization of operations and that allowing him to participate in the decision making process will encourage a more active identification with the workplace and stimulate productivity.

The point is that management attitudes toward employee participation are changing generally, and in any event, once a group of employees decides to engage in collective bargaining, matters formerly within management's exclusive domain are now subject to a process of bilateral negotiation. For this reason, it must be of limited significance, when assessing the consequences of employee influence, that the areas of such influence include matters normally considered "managerial."

Moreover, when the employee influence under consideration could as well have been achieved through collective bargaining, the conclusion that such influence can bar those employees from themselves engaging in collective bargaining under the Act becomes positively bizarre. This is precisely the case with regard to faculty. Many of the labor agreements negotiated by organized faculty in the private sector provide for precisely the type of influence held by the Court of Appeals sufficient to deny bargaining rights to the Yeshiva faculty. It may arguably be true that the influence of the Yeshiva faculty is in fact greater than that of any unionized faculty, simply because the Yeshiva administration accedes more readily to faculty recommendations. But that in my judgment affords no basis for the result reached by the Court of Appeals. The giving of advice does not make an employee a manager. And advice is no less advice when it is taken.

It is thus clear that the managerial employee exclusion developed by the Labor Board and affirmed by the Supreme Court is consistent with the Act's central purposes in that it serves the limited purpose of preserving the integrity of the bilateral process which the Act contemplates. But by applying the definition to employees who, without more, exert frequently effective influence on their employer from a position outside the management structure, the Court of Appeals in *Yeshiva* has extended the sweep of the "managerial employees" exclusion well beyond its intended limits. Furthermore, it has unwisely injected the Board and the courts into a necessarily impressionistic assessment of the quality and substance of the faculty-administration-governing board relationship. It has, in practical effect, conditioned bargaining rights under the Act on a limited level of pre-existing employee influence. This I believe to be both bad policy and bad law.

### Faculty Independence and Judgment

It is apparent that faculty are not "managerial employees" under the pre-*Yeshiva* definition. Faculty are not, as required by the Board's definition, aligned with management, understood to be an institution's administration and governing board. In fact, faculty *independence* from management is widely accepted and was stressed by the Court of Appeals itself, albeit for the wrong reasons.[23] In any event, it is to my mind plain that the faculty role, however decisive it may be at particular institutions and at particular times, consists of neither more nor less than the vigorous exertion of influence on those responsible for managing the institution.

Moreover, and to the same point, faculty influence in higher education derives not at all from their position in any organizational hierarchy. Rather it is a logical by-product of their professional expertise and the intensely individualistic attributes of their teaching and research responsibilities. These factors have necessarily resulted, at many but by no means all institutions, in heavy administration reliance on faculty expertise as a tool in making critical decisions. As the former Controller of Teachers College, Columbia University, observed, "The board [of trustees] in fulfilling its responsibilities for management, requires the aid of the faculty . . . because the Board does not, unaided, possess the best judgment in all matters involved."[24]

The most frequent and obvious area of faculty influence is in faculty personnel matters. No administrator can honestly feel comfortable in making a unilateral assessment of the competence of a faculty member engaged in highly specialized work. For this reason, it is only natural for such administrators to rely heavily on faculty judgments on the merits of such matters. It is important to note, however, that this reliance on faculty expertise by no means strips the administrative role of any substance. For although the administrator cannot be expected to make by himself decisions on the merits of faculty personnel matters, he retains the primary responsibility for making fundamental managerial decisions having to do with the number and compensation of faculty members employed by the institution, decisions which can and frequently do effectively override positive faculty personnel decisions.

In short, the faculty influence at Yeshiva and elsewhere flows naturally from their individual and collective professional expertise. As with all influence, its actual impact varies with the players and the issues. The faculty nonetheless without doubt play a vital role, and because their expertise is central to the academic enterprise the resulting employment relationship is substantially different from that of the ordinary industrial worker. But it is perfectly possible conceptually, and indeed it is perfectly consistent with the purposes of the Act and with actual experience, for faculty influence to be exerted in a variety of ways alongside the process of collective bargaining over wages, hours and other terms and conditions of employment. Those who are engaged in collective bargaining in higher education know that, however arduous it may be, it can be made to work well.

**Consequences**

Despite the firmness of my views as to the merits of the Second Circuit's decision in *Yeshiva,* I have much less doubt as to how the Supreme Court will dispose of the matter. I have much less doubt that, if affirmed by the Supreme Court, the decision will have a broad impact on faculty collective bargaining, especially, but by no means entirely, in the private sector. It is true that some have claimed that the decision may be narrowly read, and that the facts at Yeshiva University are sufficiently untypical as to prevent any broad application of the Second Circuit's decision. I disagree. I believe that the *Yeshiva* decision, if affirmed, will have a very considerable impact on faculty organizing, as well as on those faculties which are already organized. Moreover, I believe the decision, if affirmed, will have at least some spillover effect in the public sector as well, as state legislatures and governing boards catch on to the idea that faculty bargaining can be stopped cold through the assertion that faculty are "managerial" or supervisory employees.

While it is doubtless true that there are many institutions in which the faculty play little or no role in academic governance, there are many more institutions, including some that are already organized, where the faculty role parallels that found at Yeshiva in most important respects. And whether or not, with respect to any or all of such institutions, the Labor Board or the courts would ultimately hold their faculties to be "managerial" or supervisory employees, the very possibility of such a holding will serve as a real deterrent to faculty organizing efforts. There is already some evidence of this. The governing boards of at least two private institutions, Drury College in Missouri and Salem College in West Virginia,[25] have continued to refuse to bargain after the election of faculty unions, arguing that their faculties are covered by *Yeshiva*.

It must be remembered that even prior to *Yeshiva* faculty unit determination proceedings before the Labor Board consumed substantial amounts of time and expense, with the result that the delay between the filing of an election petition and the conduct of a collective bargaining election has often been in excess of a year. Such delays are extremely taxing and tend to frustrate responsible organizing efforts. But at least prior to *Yeshiva*, there was a fair certainty that once the Board proceedings were concluded and the election won by a faculty union, collective bargaining would commence reasonably promptly. If the *Yeshiva* decision stands, not only will faculty unions face even more protracted Board proceedings, but also the virtual certainty of subsequent judicial review with the resulting continued delay and enhanced uncertainty. This experience has not been unknown in the past, viz., the Boston University experience;[26] but after *Yeshiva* it will occur with much greater regularity. Anyone who doubts the impact of this simply does not understand the organizing process. My point is not that this impact on faculty organizing is good or bad. It is simply a fact, in my judgment, that *Yeshiva*, if it stands, will significantly retard faculty organizing, for better or worse.

## Effect on the Organized

Nor will the impact of an affirmance in *Yeshiva* be confined to faculties attempting to organize. Let me give just a few examples, some hypothetical and some not, of how already organized faculties will be affected by *Yeshiva*. In the first place the *Yeshiva* decision has very broad implications regarding the proper scope of mandatory bargaining under the National Labor Relations Act. Without going into any extended legal analysis, it requires no great leap to conclude that if faculty participation in matters of academic governance renders them "managerial" employees disabled from bargaining under the Act, then such participation is likely not a subject over which faculty unions may compel bargaining. The University of Bridgeport took precisely this position in the midst of negotiations with its faculty, and this was doubtless one of the factors which contributed to the ensuing faculty strike. Again, my point has nothing to do with the merits of whether or not faculties should bargain over these matters. The fact is that they have been bargaining over them, and the potential interposition of *Yeshiva*-based arguments can only have an extremely disruptive effect on those ongoing bargaining relationships. This, I believe, is objectively harmful.

Even more ominous, at least from the union point of view, is the very real possibility that a university administration or governing board at an organized institution will take the position that the *Yeshiva* decision suspends their duty to bargain. Such a position could not credibly be taken during the term of an existing collective agreement, but a university could refuse to negotiate a successor agreement, arguing that their faculty, like the faculty at Yeshiva, are also

24

"managerial" or supervisory employees. Even more ironically, the administration could argue that, by virtue of the collective bargaining agreement, the faculty had become managerial employees. Indeed this very argument was made, albeit unsuccessfully, before the decision in *Yeshiva.*[27]

## FOOTNOTES

[1] *NLRB* v. *Yeshiva University*, 582 F. 2d 686 (2d Cir. 1978), *cert. granted*, – U.S. – (1979), Nos. 78-857 and 78-997.

[2] The Labor Board's definition of "managerial employees," refined over the years in scores of cases, extends to those employees who possess substantial and independent discretion to "formulate and effectuate management policies." *General Dynamics Corp.*, 213 N.L.R.B. 851 (1974); *Palace Laundry Dry Cleaning Corporation*, 75 N.L.R.B. 320 (1947); *Eastern Camera and Photo Corp.*, 140 N.L.R.B. 569 (1963). The other significant components of the Board's definition are discussed *infra.*

[3] *Bell Aerospace Co.*, 190 N.L.R.B. 43 (1971). The Board's decision that the company's buyers were not "managerial" employees was reversed by the Supreme Court. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). The Board had held the buyers non-managerial because they had not authority over labor relations matters. The Court held that the Board lacked the authority to so narrow its established definition and remanded the case to the Board for further consideration. On remand, the Board adhered to its holding that the buyers were not "managerial employees" and ordered an election. *Bell Aerospace Co., on remand*, 219 N.L.R.B. 384 (1975).

[4] See *e.g.*, *Albuquerque Division, AFC Industries, Inc.*, 145 N.L.R.B. 403 (1963).

[5] See *e.g.*, *Garden Island Publishing Co.*, 154 N.L.R.B. 697 (1965).

[6] See *e.g.*, *Vulcanized Rubber and Plastics Co.*, 129 N.L.R.B. 1256 (1961).

[7] The Supreme Court, in its *Bell Aerospace* decision (see note 3, *supra)*, was plainly concerned that the Board's attempt to narrow its definition of "managerial employees" could result in the unionization of such clearly managerial personnel and held that such a result was barred by the Act. Thus the Court observed:

> A major company, for example, may have scores of executive officers who formulate and effectuate management policies, yet have no supervisory responsibility or identifiable conflict of interest in labor relations. If Congress intended the unionization of such executives, it most certainly would have made its design plain." 416 U.S. at 289, n. 18.

[8] The Reference Shelf, Vol. III, No. 5, *Academic Freedom*, 85 (J. Johnson ed. 1925).

[9] "As long as the number of students continued to increase every year, jobs were plentiful, salaries were rapidly rising, and institutions were expanding both their facilities and services. Now, however, the massive boom has leveled off, and job security and salary increases have become prime concerns of faculty and are contributing to widespread unionization." Kemmerer and Baldridge, *Unions on Campus* (1975) 38.

[10] See *e.g.*, Finkin, "The Supervisory Status of Professional Employees," 45 Fordham L. Rev. 805 (1977); Strauss, "Professionalism and Occupational Association," *Industrial Relations* (May 1963).

[11] "The areas of decision-making in which the faculty, as individuals, as groups (committees or departments), or as a whole, is granted an opportunity to participate vary from institution to institution, as tradition, the aggressiveness of the faculty, and the nature and attitudes of the president and trustees dictate." J. Corson, *The Governance of Colleges and Universities*, 239 (1975). See also Finkin, *Collective Bargaining and University Governance*, 57 AAUP Bull. 149 (1971).

[12] The shift over the years from outright administrative resistance to faculty claims for an increased role in governance was attributed by McGeorge Bundy not only to the in-

creased prestige attached to men of learning since World War II but to the "massive authority of the law of supply and demand" as well. Bundy, *Faculty Power,* Atlantic Monthly (Sept. 1978) at 42.

[13] The Court of Appeals' treatment of the facts before it is perhaps best illustrated by its findings with regard to the faculty role in tuition matters. The court found that "in particular cases . . . the tuition to be charged [is] *controlled* by the full-time faculty." 582 F. 2d at 696. (Emphasis supplied.) This finding is based on a single incident in which the Acting Dean of one of Yeshiva's divisions recommended a $500 increase in tuition which was rejected by the President in favor of a $300 increase supported by the faculty. 582 F. 2d at 693. Similar inferences are drawn by the Court of Appeals throughout its opinion. The Court's ultimate inference that the Yeshiva faculty are "operating the enterprise" is based on nothing more than facts showing that faculty advice on a variety of important matters is widely accepted by higher authority.

[14] *NLRB v. Bell Aerospace Co., supra,* note 3.

[15] See cases cited in notes 4, 5 and 6, *supra.*

[16] That "managerial employees" are entirely unprotected by the Act was not definitively settled until the Supreme Court's decision in *NLRB v. Bell Aerospace Co., supra.*

[17] See *General Dynamics Corp., supra; Bell Aerospace Co., on remand, supra; Palace Laundry Dry Cleaning Corporation, supra; Eastern and Photo Corp., supra.*

# 5. THE YESHIVA CASE—II

Saul J. Kramer, Esq.

*Proskauer, Rose, Goetz & Mendelsohn*
*Counsel for Yeshiva University*

Little did I know five years ago when we started the *Yeshiva* case, Ronnie Schechtman and I, that we would be on a program like this. It's hard to realize what the five years have brought in terms of that litigation and in terms of its effect upon labor relations in the college and university community.

Before getting into the nuts and bolts of the decision itself and perhaps its effect, although I don't intend to argue the case here this morning, we should try to put the Yeshiva decision in some historical perspective.

I think one thing all of us agree about is that the National Labor Relations Act was really not intended to cover private, not-for-profit, higher educational institutions in the country. Look as you will through the legislative history of the Taft-Hartley Act and the Wagner Act, you will not find a scintilla of legislative history indicating that those statutes were to cover institutions of higher education. There is, therefore, no legislative guidance as to what the National Labor Relations Board and the courts should or should not do in terms of the shared management that exists in our institutions of higher education. To the extent there is some legislative history, it is that perhaps Congress did not intend to cover them at all, did not intend to bring them within the definition of interstate commerce as it existed or was thought of in 1935. There is a quote in the *Catholic Bishops* case making reference to this, but to the extent that there is any legislative history beyond that, it is certainly silent on the subject of coverage of institutions of higher education.

## Board Jurisdiction

In 1970, as most of you know, in the *Cornell University* case, the Board decided to take jurisdiction over institutions of higher education. It had previously declined to do so on the rather tenuous rationale that it did not sufficiently impact interstate commerce. The decision in *Cornell University* did away with that rather tenuous rationale and recognized the facts of life as we all know them, that educational institutions of the size of Cornell and others most certainly do affect interstate commerce. I doubt seriously that reasonable people could differ on that subject.

Thus, since 1971, the Board has been attempting to deal with the problems of shared management in institutions of higher education, in essence to shoehorn institutions of higher education under the National Labor Relations Act which was never intended to cover them in the first place. That's one of the reasons we are here this morning, because the Board has not done a very good job in doing that. The Board has not acted in accordance with the statutory definitions or the decided case law in analogous areas and has been reversed by the United States Court of Appeals for the Second Circuit in *N.L.R.B. v. Yeshiva University*, 582 F. 2d 686 (1978). It is to that reversal that I would now like to turn.

## Faculty as "Employees"

Mr. Osborne said this morning that faculty are employees. There can be no question that faculty are employees. That is not the issue in the *Yeshiva* case or in any of the other National Labor Relations Board cases having to do with collective bargaining status. The question is not whether they are employees; the question is whether they are *supervisory* employees or *managerial* employees. No one argues that they are not employed by the institution.

Congress has said that supervisory employees are not entitled to rights under the National Labor Relations Act, and further that supervisory employees in the private sector may not be given those rights under state law. The issue, then, is this: Are they supervisors under the statutory definition contained in the National Labor Relations, Act, a broad seventeen-part definition, set up in the disjunctive, by the 80th Congress, a Congress that sought to restrict, not to expand labor organization rights?

The question is whether a group fall within that seventeen-part definition which relates to hiring, firing, the adjustment of grievances, the responsible direction of the work force. It is set up in such a way that if the supervisory employee has the power to effectively recommend in any of the areas included in the seventeen-part definition, that employee is a supervisor provided he acts in the interest of the employer – we shall deal with that – and uses independent judgment. That's question number one in these cases. Not whether the faculty member is an employee, but whether that person fits under the definition. Invariably, when this subject is discussed, this fact is ignored.

## "Managerial Employees"

The second problem area is whether the faculty member is a managerial employee, and Mr. Osborne is quite correct. The managerial employee concept is a judicially developed concept and an administratively developed concept that has been passed upon by the United States Supreme Court and most recently in the *Bell Aerospace* case. The Supreme Court told the Labor Board that an employee could be managerial even if there were not a conflict of interest between that employee's being a union member and being managerial; that conflict of interest was not the hallmark in determining whether someone was a managerial employee. The Labor Board has not learned that lesson. Read the Second Circuit's decision where it is explained at great length. It is very plainly stated by the United States Supreme Court.

Now, one other common fallacy in these discussions and then we'll move on to the four problems that the Labor Board has left us with.

It is frequently said, not only that the question is whether they are employees – obviously they're employees – but whether the faculty are supervisory or managerial employees and control the enterprise. They do not manage the enterprise. They do not run the enterprise. That is not the issue. It has never been the issue since the first day the *Yeshiva* case record opened. It is not the issue today. Nor is it the issue in higher education generally. The issue is not whether they control the institution; the issue is whether they meaningfully share in the management of the institution. They do not have to run it completely to be managerial employees.

What managerial employee, whether it's in Textron or A.T.&T. or the New York Telephone Company, short of the chairman of the board or the president, manages the enterprise completely? No manager manages an enterprise completely. All of them *share* in the management of the enterprise.

The facts at Yeshiva having gotten out of the way of the red herring, so to speak, that invariably creeps into this kind of discussion, I would now like to turn to what the Labor Board has been doing in this area. But first a word or two about Yeshiva University.

Yeshiva University has about 250 faculty members. It has three separate campuses: one in downtown New York, one around 34th Street, and another in the Washington Heights area of Manhattan. It also has a Medical School that really doesn't figure in this morning's discussion. The National Labor Relations Board held that, with the exception of the category of "principal investigators" (certain administrative faculty personnel), each and every full-time faculty member at that school was a rank-and-file employee, including the department chairman. (There was an uncontroverted record on that issue.)

Now, what was the result of that kind of decision? A college like Yeshiva College, which is a basic undergraduate college giving a B.A. degree, had 108 faculty members. The only person left as supervisory at that college was a dean who actually taught a couple of courses in his own right and was a member of the faculty, providing a ratio of 108 to 1. (The figure included both part-time and full-time faculty.) When you got to the other colleges, you find ratios like 30 and 40 and 50 and 70 to 1. So what the National Labor Relations Board did essentially was to leave the deans and a handful of vice presidents, out of the bargaining unit and stick everybody else in on the ground that they were rank-and-file employees. Assuming that the election had been won and the union validly certified, the administration would then have been left to manage and supervise the institution on the basis of supervisory ratios that make no sense.

Consider that a lowly first-level foreman in a public utility supervises six employees and has a ten percent salary differential as compared with his six employees. He only minimally but effectively recommends things like termination or transfer or the adjustment of grievances as a supervisor under the meaning of the National Labor Relations Act. Contrast that with what was done at Yeshiva University. What the Board did was to gut the supervisory managerial matrix of Yeshiva University. That was clear on the face of the decision and that's what faced the Court of Appeals.

There was more than one issue in the *Yeshiva* case. Faculty status as managers and supervisors was one issue. The status of the chairmen was another.

It was in this posture that the *Yeshiva* case reached the Second Circuit. And there we attacked the four fundamental principles that the National Labor Relations Board has been using to include faculty in bargaining units as rank-and-file employees rather than classifying them as supervisory or managerial employees, despite the fact that they share, very meaningfully, in the management of the institution.

What are these four principles? First, there is an overextension of the concept of professionalism. Second, there is a "collective exercise" concept. Third, there is the argument that the faculty is acting in the interest of the faculty, not in the interest of the university. And finally, there is the statement that the faculty's decisions and managerial functions are subject to the ultimate authority of the Board of Trustees. Let's turn to these four principles in the time that remains.

## I. NLRB'S Concept of Professionalism

I don't think people in this room differ substantially on the proposition that the faculty at many of our institutions of higher learning make effective recommendations concerning the hiring, termination (and by termination I mean non-renewal of probationers), promotion of faculty, and the granting of tenure. Not that they make these decisions in and of themselves but that their recommendations are effective with the bodies that do the actual appointing – the Board of Trustees, or an executive council or committee of the Board of Trustees, or the President of the institution, however the institution is set up. Is this simply a function of professionalism, of their specialty discipline? Are we simply deciding that Max is a great teacher of Swahili, that he will show professional growth? Or are we deciding that Max, in addition to being an expert in his field, possesses certain personal attributes that will make him a better faculty member – just as any employee who needs a promotion has certain personal attributes that will allow him to have that kind of promotion? Is this so-called academic judgment based entirely on special professionalism, or is it broader? Does it share in many of the aspects of decision-making that we have in the private sector? Does it involve departmental budget-making over which many faculty committees have control or upon which they have a significant effect?

Actually, faculty have a tremendous amount of power in determining curriculum. Curriculum is the product of the educational enterprise, and faculty effectively determine it at most schools. Faculty have a tremendous amount of power in determining how many students will be admitted to a particular school – vitally important in determining the revenue, productivity and cost effectiveness of the faculty at the particular school.

In addition, faculty have tremendous power in determining the grading system. The grading system is not simply an academic exercise. The grading system materially affects how many students you draw and how many students you retain and the amount of tuition you are able to bring into one of these institutions. It isn't decided *in vacuo* and it can't be decided *in vacuo*. Grading on a curve, grading pass-fail and all the other variations of the grading system are not only professional; they have a managerial factor to them, and anyone who knows anything about the nitty-gritty of higher education knows that to be a fact. And it can't simply be wiped away.

Finally, in many schools, faculty have control of, or certainly a meaningful impact on, effective recommendations for restricting increases in tuition levels. That was certainly so at some of the schools at Yeshiva and was demonstrated in the record.

In such areas of managerial exercise and control, faculty have substantial power. Whether the issue is personnel-oriented on this side or managerial, quasi-academic on the other side, the faculty have enormous power, and it goes beyond their narrow professionalism. That Hans Bethe at Cornell is a great physicist and a Nobel prize winner is one thing. What he does as a physicist in the narrow areas of publication and teaching physics to graduate students is one thing, but when he walks over into this managerial area, he becomes a managerial person, contributing to the management of the enterprise, and is a supervisor under Section 2(11) of the National Labor Relations Act.

It isn't enough to say that a professional is a professional, hence he's not a supervisor. You have to look at what he does, and what he does is much more what I have said than what Mr. Osborne has said here this morning. That's the reality of the record in this case.

## II. The Question of Collective Exercise

The Labor Board has developed a concept that if managerial status is exercised somehow collectively – they would say collegially – in a group rather than as individuals, then somehow this is not managerial status. Anyone who has functioned in the private sector in industry knows that managerial power and prerogatives are frequently exercised collectively by group decision-making in committees and the like. Even the board of directors of a corporation is a group. An executive committee is a group. Divisions are run by groups. Enterprises within divisions are run by executive committees and broader committees. To say management is not management because it is collectively exercised is to gainsay all the knowledge we have developed in the private sector.

### III. Action in Whose Interest?

NLRB's third test argues that the faculty operates in the interest of the faculty, not in the interest of the university. Judge Mulligan made short shrift of that in pointing out that the faculty of Yeshiva University was rarely reversed and that the interest of the faculty and of the University are inextricably related. And indeed, they *are* inextricably related. Where else do you have, as Mr. Osborne said, the producers in the enterprise also being the shared managers of the enterprise? It's a new phenomenon in American life, and Judge Mulligan is quite correct in arguing that management can be shared, is shared, and can be exercised on a group basis; it is no less management because it is exercised by faculty who are managerial employees in the interest of themselves and the institution they share in managing. There is nothing new about that kind of concept and there is nothing illogical about it.

### IV. The "Ultimate Authority" Doctrine

Now, finally to the last of the four hurdles we had to jump in the *Yeshiva* case and will have to jump again in the Supreme Court of the United States – the ultimate authority doctrine. The National Labor Relations Board, in perhaps the most disingenuous exercise I have witnessed in twenty years at the labor bar, concluded that faculty are not supervisory or managerial because the Board of Trustees of the institution has ultimate authority to run the institution.

Remember that first-level foreman with the six employees working for Con Edison who can effectively recommend a few minor things like adjustment of grievances and can responsibly direct employees – make them go from one place to another, using independent judgment; he is a supervisor under this law. There is a Board of Trustees at Con Edison. There is a Board of Trustees at General Motors. There is a Board of Trustees at every enterprise in the private sector. To say that the managerial employees at Textron are not managerial because there is a board of directors, and to say that the faculty are not managerial at Yeshiva because of the Board of Trustees is rank foolishness, and Judge Mulligan labeled it precisely that. The Court reversed the National Labor Relations Board, 3 to 0.

One of the things the Court did was to recognize that in this area the National Labor Relations Board's vaunted expertise is really not expertise at all; that its decision has not analyzed carefully what is going on in these colleges; that it has used a push-pull, quick-quick kind of mechanistic jurisprudence to reach its results; and that its rationales, expressed in this cryptic fashion in case after case, without detailed exegesis, were not worthy of being followed and treated as expertise. I hope the United States Supreme Court reaches the same result.

### For a Legislative Solution

Now, what really should happen here? What should really be done to straighten out this mess? The answer is not to have the United States Supreme Court rewrite Section 2(11) of the National Labor Relations Act and the definition of managerial employees to fit AAUP's definition. (It would like that very, very much.) The answer is for Congress to consider the kind of problems that we have here – to consider them, to hold hearings on them, to go into them in depth and to legislate in this area. Not to take the National Labor Relations Act and twist it and torture it in ways that it was never intended to be twisted or tortured, and in ways that are not supported by the record in the cases that are being made.

As one example, in dealing with principal investigators, the National Labor Relations Board held in several cases – N.Y.U. and Fordham – that the principal investigators were not employees of the institutions. Well, if they weren't employees of the institutions, they must have been employees somewhere in limbo. Everyone who was involved in those cases knew quite well that they were employees of the institutions. To duck this issue in the early stages of the developing law in this area, NLRB actually held them to be non-employees. We have to avoid this type of thing. What we need is an orderly resolution of this problem, and I suggest that Congress is the place to do it; not in the courts, and not before the National Labor Relations Board.

## The Impact of the Yeshiva Case

What will happen to collective bargaining after the *Yeshiva* case? Assuming for a moment that *Yeshiva* is reversed, I think Basil Paterson is quite correct that the impact of litigation will now turn to subject matter – what are the mandatory subjects for collective bargaining? The concept of representation exclusivity that has grown up under the National Labor Relations Act will be put under pressure by university and faculty senates as they try to work out areas of authority.

If the *Yeshiva* case is affirmed, then we will still have the problem of subject matter and authority because faculty bargaining will continue. All that will occur is that organization will not proceed under the aegis of the National Labor Relations Act or state law. Where there are injustices, where there is a loss of dignity, where there is discord, where it is substantial, faculty will still be able to organize and bargain provided they have the economic muscle to do it. All they will have lost is the protection of the National Labor Relations Act which allows an election on the basis of a simple thirty percent showing – a simple thirty percent showing to obtain an election with all that this implies on a campus in terms of discord, ill will and abrasiveness. So I do not see that, either way this case goes, it is going to be the death knell for faculty bargaining. We will definitely have litigation in the subject matter area if the case is reversed. We will have less litigation in that area and more of a question of developing new types of relationships, based on consensual status, based on economic ability to coerce, based on the degree of harm, without the aegis of law. Either way, the Supreme Court will tell us.

# 6. THE YESHIVA CASE—III

Ronald H. Schechtman, Esq.

*Gordon & Schechtman, Attorney for Yeshiva University Faculty Association*

The following text consists of excerpts from the Petition for a Writ of Certiorari submitted by the Yeshiva University Faculty Association to the United States Supreme Court. This text omits most legal citations and footnotes. It also excludes that portion of the petition dealing with the disputed facts of life and governance at Yeshiva University, as interpreted by the United States Circuit Court.

The petition was granted by the Supreme Court, and we anticipate argument of the case in the early fall of this year. As the petition indicates, we construe the issues before the Court as having not only a substantial bearing on the rights of collegiate faculty, but on the rights of other classes of professional employees to coverage under the National Labor Relations Act.

## The Board's Logic

The NLRB's conclusion that the faculty of Yeshiva University are neither managers nor supervisors was a proper and reasonable application of the Act in view of:

> **(a) the status of faculty as professional employees pursuant to Section 2(12) of the Act;**
>
> **(b) the action of the faculty in the decision-making processes of the University is on their own behalf, rather than in the interest of the employer;**
>
> **(c) such action of the faculty is collective; and**
>
> **(d) such action is effectively subject to the authority of the University administration and Board of Trustees.**

These grounds in support of affording faculty in higher education protection under the Act have been consistently applied by the Board, and have been approved and applied accordingly by the First Circuit of the United States Court of Appeals (*Boston University*, 228 N.L.R.B. 1008 (1977), enforced, 575 F.2d 301 (1st Cir. 1978), petition for cert. pending, No. 78-67). The decision of the Court of Appeals in the instant proceeding, however, concluded that the foregoing grounds applied by the Board in support of affording coverage under the Act to the University faculty were "unjustified [and] arbitrary"

There therefore exists a conflict between the circuit courts and between the Second Circuit and the Board with respect to the standards applicable to the determination of the status of faculty in higher education under the Act. This issue is a significant and recurrent one, affecting over sixty existing faculty bargaining units at other institutions of higher education under the jurisdiction of the Board and all other faculty in private, higher education who may hereafter seek coverage of the Act. Review by this Court is therefore warranted.

## Faculty as Professional Employees

While the Act excludes supervisors from its coverage, it includes express provisions for the inclusion of professional employees. These dual directives are directly counterposed in this case. The Board has in a consistent line of precedent balanced these legislative enactments in determining that faculty action in the areas of supervisory authority enumerated in the Act derives from their professional status and mission rather than their alignment or identification with the employer and its mission.

The professional status of the University faculty, as contemplated in the legislative and adjudicatory history of the Act, does not preclude a finding of their status as managers or supervisors, but requires a distinction between their identification as professional employees and as supervisory or managerial representatives. The court below failed properly to weigh or consider this distinction in determining the status of the University faculty.

At the same time Congress acted to exempt supervisors from coverage under the Act on the grounds that they are "traditionally regarded as part of management," Congress provided that professional employees be allowed organization under the Act in presumptively separate bargaining units. Section 2(12) of the Act not only recognized that the independent judgment and discretion inherent in the fulfillment of the professional employee's mission do not necessarily render him a supervisor, but also that professional employees often work collectively with junior professionals "under the supervision of a professional." Thus the definition of a professional, the legislative history indicates, "covers such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants."

The court below acknowledged that the authority of the University faculty to determine course content, teaching method, and student evaluation fell within Section 2(12) of the Act and "should not characterize them as managerial or supervisory." But because the faculty exercise what the court described as "extensive control" with respect to curriculum, workload, rank, salary and tenure of other faculty, and other University policy, "they are no longer exercising individual professional expertise [but are] in effect, substantially and pervasively operating the enterprise."

The court mistook the role of the faculty in the fulfillment of their individual professional missions for their interest in "operating the enterprise." The role or mission of the professional employee may often merge with the mission of his employer. For the hospital physician, for example, it is to render the highest quality of medical care; for the community legal service lawyer, the delivery of the most effective advocacy and representation; and for the faculty member, the practice of optimum didactic skills. While the hospital, legal services program or university may be dedicated in purpose to corresponding aspirations, they must be operated with a separate, even sometimes conflicting perspective related to fiscal and other managerial constraints.

Professional employees may participate with their employer in keeping the highest calibre of co-professionals to complement by specialty, discipline or experience the balance of a department; they may participate in self-evaluation of their colleagues and programs; they may advise the employer with respect to the means of improving the rendering of their services. Their decision to discharge or operate on a patient, to appeal a judicial ruling, or to deny or grant admission to certain students may all affect the employer's finances or policy.

These actions, however, do not derive from managerial or supervisory prerogatives. They are rather the fulfillment of the discretion and expertise inherent to the professional and implicit in his job responsibilities. They operate in no vacuum, but are subject to legal, regulatory and professional contraints, as well as the policy limitations of the employer.

Thus the record here shows involvement of the University faculty in many areas of faculty governance. That involvement, however, is not only defined by their professional identity, but is confined by managerial policy over which they exercise no control and subject to supervisory authority in which they do not share. The governing body of the University is the Board of Trustees which includes no faculty. The Executive Council sits under the Board of Trustees and is appointed by the President, statutorily limited to university officers. The University, officers and administration include no faculty in the bargaining unit, and the deans of each school are their respective chief administrative officers, reporting to the University Vice-Presidents and President.

The President is exclusively authorized to hire full-time faculty upon recommendation of the dean or director of each school. Prior to any recruitment of new faculty, he must authorize the filling of an open position. The dean or director will interview and screen the merits of each candidate after preliminary screening by faculty. When the recommendations are forwarded to the President, he actively participates in the decision-making.

Rank, salary rate and term of appointment accompany the President's appointment. Although faculty at two schools submit recommendations in these regards, the available budget line authorized by the administration generally determines the rank and salary of a new appointee. With respect to the discipline of faculty members, the record here is silent as to any involvement by faculty members, individually or collectively.

Most schools of the University have faculty committees which submit recommendations on faculty promotions to their respective deans. The dean then refers his own recommendation with that of the faculty committee for an independent review by the Vice-President for Academic Affairs, who has on a number of occasions rejected the recommendations of faculty in his denial of promotions. The role of the Vice-President of Academic Affairs is central in this and most other faculty personnel decisions, as he described it:

> All recommendations for promotions finally wind up on my desk . . . I evaluate them . . . [and] in the course of going through these recommendations, therefore it is common for me to have to be in touch with the dean to ask for additional information, or to express problems that I am having in seeing how that recommendation is arrived at . . . I have had conversations with almost every dean who has recommended every promotion in those terms. . .
>
> [After consultation with the dean, I draw my own conclusion] so it becomes clear to me that it is not merely sort of an internal routine rubber-stamp promotion.

Tenure rules and procedures are promulgated by the Board of Trustees and were recently–and unilaterally–revised by the Board. The President has the sole authority, acting on behalf of the trustees, to grant tenure, and the record here indicates that this authority is independent and absolute. Most schools do not even have a formal review procedure prior to the award or denial of tenure, although some departments or committees may make recommendations to the President through the deans, who have effectively vetoed or blocked faculty recommendations for tenure.

Faculty input in these decisions is not insignificant. The faculty may refer prospective new hires who are professional colleagues or associates. They may weigh and consider the qualifications of the individual as they relate to the *academic* needs and program of the department or school. They may advise the administration of the professional merits or distinction of the work of a colleague, even as it may relate to his standing in the department or school. But the role of the faculty of Yeshiva University in these areas is advisory, at best, and circumscribed by the scope of professional expertise of the faculty as it relates to the academic or professional judgment involved.

Despite the exercise of such judgment by faculty, the needs and exigencies of the institution ultimately govern. University administration applies a separate and distinct perspective to the decisions referred to it. While the faculty may render professional judgment on the merits of a professional, University officers first independently review that judgment and then balance its consequences with managerial and fiscal policy in which the faculty play no determinative or advisory role.

The record indicates that the administration has not only rejected faculty judgments on academic merits in these personnel decisions, but that its unilateral determination of managerial policy has even precluded advice and consultation from the faculty. Thus in 1971 and 1972, the President froze all faculty ranks and notified the faculty that no promotions or salary increase would be granted at the University. At one school, the President froze all promotions between 1971 and 1974.

## The Arena of Collective Bargaining

The lower court nonetheless characterized faculty involvement in such decision-making processes as "shared authority" in the governance of the University. Even if deference were allowed to the fact-finding of the court, it assessed the role of the faculty without a distinction between its role *as professionals* in determinations affecting the integrity of the academic programs of the University and its role in determining managerial policy as it implicates the operation of the University. It is this same distinction which allows professional employees coverage under the Act, but disallows their address to managerial prerogatives in the arena of collective bargaining.

The accommodation between collective bargaining and managerial prerogatives confines the former to hours, wages, and terms and conditions of employment. The Act leaves beyond the scope of mandated bargaining the input of professionals in the quality or character of the services delivered by the employer, which subjects remain under the ultimate and unilateral authority of management. Separating out those matters amenable to the bargaining relationship and those reserved to management is the function of the Board. The proper scope of faculty bargaining is thus not the academic integrity of the University's "product," but the economic matters of faculty hours, wages, and working conditions—a distinction plainly capable of administration.

**Legislative Background**

When the House Committee on Education and Labor recently considered the question of the coverage under the Act of interns and residents, it favored legislative reversal of the decision of the Board, which excluded house staff officers on the grounds that they were primarily students. The Committee noted the analogous experience of faculty and other professional employees under the Act.

> The other objection cited in *Cedars-Sinai*, and voiced by some witnesses opposed to the bill, was that housestaff collective bargaining would necessarily implicate matters of education that are not suited to the bargaining process. . . . We find this objection untenable. The act limits the scope of collective bargaining to wages, hours, and terms and conditions of employment, and we are confident that the Board can and will confine housestaff bargaining to such matters as distinct from those which are solely didactic in nature. Newspaper reporters bargain without improperly implicating freedom of the press, faculty at religious educational institutions bargain without improperly implicating freedom of religion, faculty at educational institutions bargain without improperly implicating academic freedom, and housestaff can bargain without improperly implicating their education. State and local labor relations agencies have been able to distinguish proper subjects of housestaff bargaining—such as wages, vacations, hours, insurance coverage, uniforms, laundry, meals, on-call rooms, tenure, etc.—from purely educational matters, and we believe the Board can do the same.

**Economic Issues**

Whatever else the faculty and university administration relationship entails, it surely requires an address to faculty salaries, insurance benefits, work schedules, etc.—the staples of all collective bargaining contracts. The decision of the lower court fails to separate out in the faculty-administration relationship the economic subjects which are bargainable from those subjects of educational policy which are not. The Act mandates the performance of precisely that function of the Board. Although the University management and its faculty may share certain interests and even some expertise in fundamental aspects of the University's operations, the faculty may not impose that standing or expertise in the collective bargaining relationship where it does not affect their "hours, wages, and terms and conditions of employment."

The precise experience of the Yeshiva University faculty in dealing with its administration over hours, wages, and terms and conditions of employment underscores the disparate standing and the distinct interests of the faculty vis-a-vis its management. That experience has borne out, on one hand, the practicability of a bargaining relationship at the University; and on the other hand, the shortcomings of that relationship without the protection of the Act.

Salary scales for most full-time faculty have long been determined according to negotiations between faculty welfare committees and University administration. Yeshiva College and Stern College, for example, have negotiated jointly with the University administration since 1968 in the determination of faculty salary scales. The welfare committees from both schools consist of elected members of the full-time faculty. Most recently these welfare committees have jointly negotiated with the Vice-President for Business Affairs, establishing salary rates for all full-time faculty at both schools, including department chairmen and senior faculty. These rates are also given effect for the full-time faculty at Erna Michael College, one of the Jewish Studies Programs for the students of Yeshiva College. The Yeshiva-Stern Welfare Committees have also taken up matters of fringe benefits and pensions, as well as retirement age.

The faculty have accordingly established some bargaining history with University management. Those negotiations and "agreements" have been limited to areas traditionally covered in collective bargaining. The management of the University has not "bargained" with the faculty over its prerogatives, but has allowed the faculty a voice in issues of academic programming only consistent with their professional expertise. That faculty voice has been heeded only insofar as management, in its unfettered discretion, finds its message consistent with the policy or fiscal constraints of the University. Coverage of the University faculty under the Act would not disturb the nature or balance of that relationship.

### Areas of Professional Expertise

In matters of curriculum and student affairs, faculty involvement is precisely limited to areas of their professional expertise, and ultimately checked by supervisory or managerial authority. Faculty play an active role in the formulation and development of curriculum, as do the deans and even the students at the University. This role at various schools may be through committees, departments, faculty (and student) assemblies. In each case the faculty usually act by consensus, with the dean's usual approval following. The faculty may in a similar context work out requirements for majors and undergraduate degrees, as well as standards for admissions, grading, examinations and graduation, although they must conform, where applicable, to requirements of the New York State Department of Education.

In each of these areas, faculty action is nonetheless circumscribed by University policy and direction, with direct participation and direction from University officers, such as the Vice-President for Academic Affairs, the Registrar, and deans and directors of the schools. Thus the Vice-President for Academic Affairs testified:

> All of our academic planning at the university has financial implications and financial needs, and therefore, just as I supervise and coordinate the academic planning throughout the university, Dr. Socol does so with respect to the fiscal wherewithal for such planning. He is the head of what they call the Office of Financial Services, of the university.

The Registrar likewise takes part in questions regarding student standards and grading, while students will also often be allowed to contribute to decision-making in these areas as members of various curriculum and standards committees, as well as members of other student-faculty bodies at most of the schools. Moreover, the deans play an active role in each of these areas, usually maintaining the final authority at each school to implement any change in curriculum or standards.

One dean characterized the activities of the curriculum committees as "a self-evaluation process." As a fundamental incident to their professional role, faculty unquestionably structure their own courses and examinations, review the curriculum of their departments and develop new curriculum. In each of the schools, as separate collegiate bodies, they evaluate their own professional performance, as well as the performance of their students. Most directly involved in the student-faculty interface, they also establish standards for student performance and admissions--all, however, subject to approval of higher, administration authorities, who maintain and act on their authority to direct, manage and ultimately approve or disapprove of collegiate faculty action. With even Committees on Committees, faculty action in this area originates in an intricate committee structure which generally refers all action to the faculty as a whole, where the collegiate consensus is referred to the dean for his action within the constraints set and enforced by the University administration. The hierarchy is the same at each school and division, with the ultimate authority with the deans and administration to restrict and define policy according to that which emanates down from the Board of Trustees, rather than up from any collegial body of faculty.

### Impact on Management

While faculty, like other professional employees, exercise substantial authority in "matters of importance to the employer's financial and other managerial interests," Congress nevertheless chose to afford them protection and coverage under the Act. The Board explained in *General Dynamics Corp., Convair Aerospace Div.*, 213 N.L.R.B. 851, 857-58 (1974):

> Work which is based on professional competence necessarily involves a consistent exercise of discretion and judgment, else professionalism would not be involved. Nevertheless, professional employees plainly are not the same as management employees either by definition or in authority, and managerial authority is not vested in professional employees merely by virtue of their professional status, or because work performed in that status may have a bearing on company direction. Likewise, technical expertise in administrative functions which may involve the exercise of judgment and discretion does not confer executive-type status upon the performer. A lawyer or a certified public accountant working for, or retained by, a company may well cause a change in company direction, or even policy, based on his professional advice alone, which, by itself, would not make him managerial.

### Professionals or Supervisors?

This recognition of the role of the professional relative to the mission of his employer was again considered by Congress in its enactment of recent amendments to the Act to provide coverage for employees employed in not-for-profit health care institutions. Congress rejected an opportunity to amend section 2(11) of the Act to exclude certain professionals from the definition of "supervisor," but in so doing both the House and Senate reports emphasized the distinction between supervision in the interest of the employer and supervision in a professional capacity in aid of a professional mission:

> The Committee has studied [ § 2(11) of the Act] with particular reference to health care professionals, such as registered nurses, interns, residents, fellows, and salaried physicians, and concludes that the proposed amendment is unnecessary

> because of existing Board decisions. The committee notes that the Board has carefully avoided applying the definition of 'supervisor' to the health care professional *who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients and thus is not the exercise of supervisory authority in the interest of the employer.*
>
> The Committee expects the Board to continue evaluating the facts of each ease in this matter when making its determinations.

The lower court failed to review this statutory history, as it affects both the definition of professional employee's coverage under the Act and the congressional sanction of the Board's exercise of jurisdiction over institutions of higher education and their professional faculty. In 1947, amendments to the Act were proposed by the House of Representatives, providing that all charitable and educational organizations be excluded from Board jurisdiction. In the companion Senate legislation, the exclusion was limited to not-for-profit hospitals. In the Joint Conference Report of representatives from the House and Senate, the Senate proposal was adopted because, as the Joint Conferees acknowledged, the Board had already concluded on its own part that most charitable and educational organizations were excluded from coverage under the Act on the grounds of their insubstantial effect on interstate commerce. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947).

In *Trustees of Columbia University*, 97 N.L.R.B. 424 (1951), the Board accordingly cited the joint conference report in explaining its refusal to assert jurisdiction over institutions of higher education. Subsequently, that decision and its reasoning were overruled by the Board in *Cornell University*, 183 N.L.R.B. 329, 331 (1970), where the Board concluded:

> The fact remains that Section 2(2) contains no express exemption for non-profit employers and that subsequent legislation has indicated a congressional preference that the Board should favor asserting jurisdiction in lieu of creating a no-man's land of non-regulation.

In 1974, legislation came before the Congress to include not-for-profit health care institutions under Board jurisdiction. By that time the *Cornell University* precedent and its progeny were ensconced in a line of Board precedent, consistently asserting jurisdiction over institutions of higher education and their faculty. In the 1974 amendments to the Act, no debate or controversy arose over the jurisdiction assumed by the Board over institutions of higher education or their faculty, while the sole remaining exclusion of not-for-profit employers was removed as health care institutions were legislated under Board jurisdiction.

The Senate Report on the 1974 amendments to the Act concluded that there was "no acceptable reason" why hospital employees should remain excluded from coverage. With the Board having already assumed and exercised its jurisdiction over faculty in higher education, the Congress completed the circle of coverage afforded under the Act to employees of not-for-profit institutions. As the Congress specifically intended to extend coverage to specific professional health care employees under the 1974 amendments to the Act, it looked to the Board's prior interpretations of the supervisory exclusion of professional employees. At that time, the Board had well enunciated its standards and principles relative to the application of the Act to faculty in higher education.

The lower court has now rejected those standards as "unjustified [and] arbitrary." Its decision rejects not only the soundness of those standards as relied upon by Congress, but as consistently applied by the Board and as recently upheld by the First Circuit Court of Appeals in *Boston University, supra.* The decision of the lower court stands alone in its finding that the Board's standards, as applied in virtually all cases involving faculty in higher education, are in conflict with the Act.

**Faculty's Collective Interest**

The court recognized that the Board has consistently denied managerial or supervisory status to faculty in higher education on the grounds that the faculty act on their own behalf and not on behalf of the employer. The court rejected this finding and conclusion of the Board and found that faculty action in university governance is rooted in "the very nature of the educational process" and based on the concept of "shared authority," originating in the Middle Ages. In sum, the court said, there is "no significant divergence between the interests of the faculty and those of the administration or the Board of Trustees." The Board's "attempt" to dichotomize those interests, it said, is a "strained, artificial separation" because:

> . . . the faculty has initiated, and the administration has repeatedly accepted, major policy determinations which constitute *the essence of the University's educational venture.* We cannot conclude that the full-time faculty here has acted in its own interest. (Emphasis supplied).

In its "interest analysis" the court fails to recognize or distinguish the professional mission of the faculty as employees relative to the responsibility of the employer to operate the institution according to exigencies and considerations beyond the University's "educational venture." Thus the decision of the court is silent with respect to the relationship between the faculty and administration in the processes affecting the determination of faculty hours, wages or terms and conditions of employment. The court focuses on "shared authority" in action relative to the merits of the academic programs or "educational venture" of the institution.

It is clear that a determination of either supervisory or managerial status requires a finding that the employees act in the interest of the employer. Section 2(11) of the Act thus defines those areas of authority in which an employee must act "in the interest of the employer" to render him a supervisor. In *Jas. H. Matthews & Co.* v. *N.L.R.B.*, 385 U.S. 1002, the court summarized the relevant judicial analysis in review of a Board decision determining the nature of an employee's exercise of authority in the areas enumerated under Section 2(11) of the Act:

> [I]t is not alone that (the employee) may hire or fire or lay off or discipline. He must do so in the interest of the employer*** (T)here must be a determination of status based upon the "nature" of the supervisory position and "how completely the responsibilities of the particular position identify the holder of the position with management," all "because of the infinite possible variations in responsibilities enumerated in Sec. 2(11) * * *"

The court then continued to discuss its discretion in review of the Board's determination on this subject:

> And where, as here, "the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. * * * (T)he Board's determination * * * is to be accepted, if it has "warrant in the record" and a reasonable basis in law.

A similar analysis pertains to the determination of managerial status under the Act. The Supreme Court concluded in *N.L.R.B. v. Bell Aerospace Co.*, that employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer" are excluded from coverage under the Act. In the Court's lengthy analysis of the legislative and adjudicatory history supporting its holding, the Court approved the criteria for determining managerial status already applied by the Board and the courts, which inquired whether the employee's interests are "more closely identified" or are "closely aligned" with management. *Id.* at 283-89. In remanding to the Board, the Court instructed: "[T]he question whether particular employees are 'managerial' must be assessed in terms of the employees' actual job responsibilities, authority, *and relationship to management.*"

The lower court's decision effectively determines that the *entire* faculty of the University are "closely aligned" and "identified" with management, in whose interests they exercise their putative supervisory authority. The court does not distinguish among members of the faculty–instructors or other non-tenured faculty, relative to senior professional faculty or even department chairmen. For the purpose of its determination of the nature of authority which faculty exercise–its "interest" analysis–the court depends on a collectivization of the faculty voice and authority. It cites no evidence of individual faculty members exercising the authority it defines as "shared authority."

But when the court considers the criterion of the Board that the collectivization of faculty authority militates against a determination of their supervisory or managerial status, it incongruously concludes that the "collective authority" doctrine is not a "realistic interpretation" of Section 2(11) of the Act, and rejects its application to the definition of supervisory status. But even if the Board's interpretation is valid, the court notes, the faculty are, collectively, managerial employees, excluded under the rationale of *N.L.R.B. v. Bell Aerospace Co.*

### Absence of Distinctions

Under the court's analysis, each newly hired instructor, as well as his department chairman and every faculty member in between, formulate and effectuate policy with an alignment and identification with management. The court thus holds that all faculty are supervisors and managers, although they manage or supervise no other full-time faculty. The entire faculty are, the court seems to say, supervisors who supervise no subordinates, managers who manage no other personnel. All full-time faculty, along with the deans, administrators, Vice-Presidents, the President and Board of Trustees, stand together, the court would have it, as a "collegiate," managerial body, including every full-time professional member of the academic community of the University. The consequence of the court's decision is to render the inclusion of professional employees under the coverage of the Act a virtual nullity.

The line between the faculty body and the University administration is virtually obliterated by the court. Although the court concludes that "the University has accepted [faculty determinations affecting the essence of the University's educational venture] without hesitation so consistently," it never denies or controverts the processes in University goverance which require virtually every academic and personnel action to be reviewed, approved and ultimately implemented by the administration. Inherent in these processes is the separation between the faculty body and the supervisors and managers of the University. As set forth in the following sections of this Petition, the issue, as articulated by the court, turns on a determination as to what extent (as well as in what respects) faculty decisions or authority are effectively determinative of the policy of the University. On this issue the lower court first fails to distinguish areas of professional, academic interest from managerial policy; and second, usurps the fact-finding role of the Board, as applied to the record in the representation proceeding.

The ruling of the court is the first and only decision to so construe the role of faculty. Although the Board has since 1971 in *C.W. Post Center of Long Island University,* articulated and applied standards similar to those applied by it here to the unique nature of the college community and the relationship between the faculty body and administration, the court here applied Board law and policy to reach a contrary conclusion. The First Circuit Court of Appeals showed a greater deference to the expertise and experience of the Board, when it approvingly construed Board standards as applied to department chairmen at Boston University and found them to be neither supervisory nor managerial employees:

> This court first faced the significant questions which arise from the assertion of jurisdiction over post secondary institutions in *NLRB v. Wentworth Institute,* 515 F.2d 550 (1st Cir., 1975). In that case, we considered and answered in the affirmative . . . whether the institution's faculty were employees within the meaning of section 2(3), rather than supervisors under section 2(11).
>
> In considering this major policy change by the Board, we recognized that: The declared purpose of the Act is to eliminate obstructions upon commerce caused by labor unrest*** and in dealing with employer operations whose effect upon commerce has grown over time the Board believes that it is endowed with discretion to exercise a fuller measure of its conferred jurisdiction.
>
> Since the Board's first entry into the field of higher education, the exposure of the nation's universities to organizational efforts has grown rapidly, and the role of the Board in the University setting has engendered a great deal of comment and criticism. Much has been made by the Board's critics of the special governance structure in universities and the general inapplicablilty of its rules developed for private industry to the academic community, and the University here has, quite understandably, seized on this general criticism to support its case . . . But we must also note that the Board's transfer of its private industry experience and rules to the university setting was only natural and is consistent with the common law method of applying time-tested legal principles to new situations. *Boston University, supra.*

### Faculty Action Subject to Higher Authorities

After the court noted that "none of the criteria applied by the Board," discussed above, "has any particular appeal," it found the additional criterion that faculty remain subject to the ultimate authority of the Board of Trustees to be "particularly unconvincing." Where the Board has applied this ground for the denial of supervisory or managerial status to faculty, however, it has never been applied disjunctively. It has rather been considered in conjunction with an analysis of (i) the status of faculty as professional employees; (ii) the interest in whose behalf they exercise their authority; and (iii) the degree of collectivization by which that authority is exercised.

This criterion of the Board has accordingly been applied in faculty unit determinations with the other criteria for the purpose of applying the Act and Board policy to the status of university faculty who act with the independence and discretion concomitant to their professional standing in a unique, collegial mode. The court characterized this uniqueness by noting that "most university faculties enjoy a state of independence and influence on policy which is 'entirely unknown among the professionals in private industry.'" But the court again failed to consider the nature of the influence which faculty exercise and how that influence is wielded in the collegial context.

While management may assign a problem to an engineer or lawyer whom it employs, it hardly can dictate the solution he finds. The extent to which management utilizes that solution may often depend on the competence of the professional and the job he did in arriving at and recommending that solution. The fact that management may ultimately use or implement and then profit from that solution does not render its creator a supervisor or manager; it reflects, rather, on the competence of the employee in fulfilling the professional mission delegated to him.

Analogously, the faculty, individually *and* collectively, are delegated responsibility for the development of curriculum and academic standards and, to a limited extent, evaluation of the professional merits of other faculty. Faculty fulfillment of these delegated responsibilities may, in fact, advance the best interests of the educational venture. But the fact that faculty recommendations in these areas may often be adopted by management is not reflective of their managerial or supervisory authority, but rather of the professional competence of the individual faculty member or the faculty of a department or school.

## Advisory and Consultative Roles

The dynamic between the advisory and consultative role of the faculty and the ultimate authority of the University trustees is central to the Board's rationale in faculty bargaining unit determinations. From the ultimate authority of the trustees, the faculty's professional responsibilities are delegated. But the failure of individual faculty members to meet those responsibilities satisfactorily will affect their continued employment, as the administration will ultimately determine for the trustees. The failure of collective faculty bodies to meet the same may give rise to the reorganization of that body, or the administration's removal of a department chairman, or the appointment of new managerial or supervisory personnel to deal with the shortcomings of the faculty.

The ultimate authority of the University Board of Trustees, as delegated to and implemented by the administration, is a real part of the governance of the institution *and* its faculty. Where faculty recommendations become University policy, they are processed through faculty committees, then considered by deans and directors, then reviewed between the deans and Vice-Presidents, and ultimately reviewed and acted upon by the President for the Board of Trustees. Throughout this process, the power of veto by administration officers and deans over virtually all aspects of faculty action is known at the University as more than a mere potential.

The Board's consideration of the ultimacy of the trustees' authority is proper and relevant in the University context. It distinguishes the standing of the faculty in a community of scholars from the interest of the University management in regulating the professional decisions of the faculty insofar as they impact on the prerogatives traditionally reserved to managerial authority.

### Conclusion

The decision of the court has not only deprived the 209 full-time faculty at Yeshiva University of representation under the Act, but promises, in a holding abberational from all other Board decisions in higher education and in conflict with the decision of the First Circuit Court of Appeals in *Boston University supra,* to make uncertain and potentially to deprive all other faculty in private higher education (as well as other comparable professional employees) of coverage under the Act. The court's application of the Act and interpretation of national labor policy, as applied to the facts before the Board, are in error.

## 7. A GOVERNMENTAL PERSPECTIVE ON THE FUNDING OF HIGHER EDUCATION

Herman Badillo

*Deputy Mayor, City of New York*

I want to say very quickly that from my point of view, having served in Congress and being very familiar with what's going on in the State of New York and in New York City, there is no doubt that the governmental prospects for the funding of higher education are very grim and they get grimmer every day, especially in New York City. If you pick up the New York Post today, or any of the newspapers, you will find that the Citizens Budget Commission says that we should eliminate all funding for the City University. This pressure will continue in the months to come.

I found in Congress that there were three things generally that bothered the members of Congress about helping New York City and three conditions that they wanted to impose. One was the abolition of rent control; the second was an increase in the subway fare; and the third was the elimination of the City University. This was a constant pattern that kept coming up during all the debates.

### Lack of a Constituency

The basic reason that there is little support for funding higher education, not just in New York City but throughout the country, is simply that you don't have a constituency. I don't know if you people realize it, but since it's my business, as a candidate for public office, to know where the constituencies are I can tell you that the constituency that supported public higher education in New York City has absolutely eroded in the past fifteen years. I was a City Commissioner in the Wagner Administration, and if anybody proposed tuition in the City University there would be hundreds of thousands of people who would be writing letters to City Hall.

Now the alumni of the City University have given up on the City University. That's one of the tragic realities in New York City today. When we called for an increase in tuition in the City University, as we did only last month, hardly anybody wrote to City Hall. I know, because I'm not only deputy mayor for policy but I'm also in charge as the liaison for education and higher education. Nobody cares any more. That's the basic problem. Without a constituency it is hard for those of us who want to support you to go out and get that support.

There are many reasons for it. We lost a lot of middle class people in New York City. Their children now go to Ivy League colleges. We find that a different group of people are going to the City University, the Blacks and Hispanics, and they don't write letters. They don't have an organized constituency.

The point is that there are still alumni out there who are working, who are my age, who are CPA's and lawyers, as I am, and who are on Wall Street. Many years ago, they would write or call. Now they just don't do it at all. We are not going to get support for higher education unless we can begin to get that constituency going again.

That is the main message I bring to you. We have to get those groups out. Those of you who are deans and administrators should realize that this is the problem in Congress, in the state legislature and in the City Halls throughout the country. I say this to you because I find that the administrators and the people who are on the Board of Higher Education are not aware of this. They are still acting as if they had power. When we tell them that what they're proposing is not going to be possible, they talk about their being independent institutions. They are not independent institutions because they have to live on public funds. Maybe ten or fifteen years ago, it was all right for the chancellor or for members of the Board of Higher Education to act as if they were independent because they had a lobby behind them. Now, when they come up with a master plan, they'd better be able to support it because there are few people on their side at public hearings.

### On the Defensive

Some of the private universities are saying that the professors in the public colleges get paid more or work fewer hours. If we don't get the information from the administrators in the public institutions, we are going to get it from the private universities, and then we are going to act on it. So it is foolish to bury your heads in the sand and not to recognize that you are now in trouble whereas years ago you were ahead. When you speak from the point of view of the majority you have a different attitude than when you are speaking from the point of view of the minority.

I learned this as a member of Congress. Any bill I introduced that had to do with the middle class would have no problem getting approved. If it was a bill that had to do with the poor, with the Blacks or with the Hispanics, then it was not going to be approved. So you have to rethink your orientation and recognize that you are now a minority in terms of your ability to get public support in this city and in this country. Therefore, you need a different strategy; you need to be able to rally greater support than you are getting now. I say this because we need you.

One of my problems is that I read the material that comes before us. For example, the Bureau of Labor Statistics recently issued a report that talked about the changing labor conposition in the New York City region between now and 1985. They pointed out that by 1985 only 22 percent of the jobs in New York City will be blue-collar jobs. That's a terrible tragedy because New York was a city of opportunity for many people who didn't go to City College and were still able to move into the middle class by working in factories. Now New York will no longer be a manufacturing city, but it won't even be one-quarter of a manufacturing city because only 22 percent of the jobs will be in factories. There are many jobs in New York City today, but those jobs require a higher degree of education than the people have.

## The Need for an Educated Population

Our problem in New York City today is not lack of jobs, it is lack of people who are educationally qualified for the jobs that exist. We have in New York today 600,000 people who come in to work in the city from Westchester and New Jersey and Connecticut and Dutchess County and Nassau County and Suffolk County because 600,000 people who are predominantly Black and Hispanic in the South Bronx and Harlem and Bushwick and Bedford-Stuyvesant are educationally unqualified for those 600,000 jobs.

A lot of people are running around trying to bring factories back to New York City. They are not going to be successful because what happened in fact was that the factories have gone where the poor came from. I have described the tragedy of the Puerto Rican community: Puerto Ricans came here looking for factory jobs, but in the meantime, the Governor of Puerto Rico, Munoz-Marin, was being very successful under Operation Bootstrap in getting the factories to go to Puerto Rico. While the people were coming here, the factories were going there, and the two never met.

Now the factories may not be going to Puerto Rico but they are going to the Dominican Republic, and we're getting Dominicans coming here as the factories are going there. The same pattern repeats itself, except that there are fewer factories left that can go. I don't believe that anybody is going to make New York a manufacturing city again.

The last year I was in Congress – the first year of the Carter Administration in 1977 – the President proposed a one billion dollar public works program. He said, "Why don't you fellows see if you can figure out how to get jobs for poor people?" So we held hearings. We found that the jobs in this country are 80 percent capital intensive. That meant that, with the one billion dollars, 800 million dollars would go to capital. But the 200 million dollars didn't go to poor people with picks and shovels. The 200 million that remained, the labor-intensive part, was for highly trained people; therefore, we use up the whole one billion dollars and no jobs really go to any of the poor. This is our problem.

I cite facts to indicate that a case can be made for supporting higher education as the avenue of opportunity in the 1980's and the 1990's to help the poor in this country become part of the middle class. That case can be effectively made if you organize youselves to make that case. You are not doing it now.

Those of us who are in office and who support public higher education find that we are struggling just to keep even. I am for the City University because I graduated from the Baruch School, and Ed Koch also went to City College, but we don't have public support for it. So we are trying to figure out a complicated way by which the state can take over the functions of the City University and at least preserve the colleges.

We're trying to do this while we are being attacked in Washington by the Congressmen and the Senators. Fortunately for us some of the most outspoken critics against the City University also went to state universities. Thus, Congressman Kelly, who comes from Disney World, whom some of you may know, always gets up to attack the City University. On a TV program, I said to him, "Congressman, where did you graduate from?" He graduated from the Orlando State College in Florida. So I said, "What's the difference? You also went to a public university except that in your case the state paid for it and in our case the city paid for it. The principle is the same." That held him down for a couple of weeks. But it is difficult to identify every congressman and senator, and it is difficult, with the limited numbers that we have, to continue to get support for the funding of public higher education.

## Rallying Support

We need to restore the massive lobby we had many years ago, and we have the case with which to do it. We need to get articles in the newspapers and magazines, pointing out how important education is in order to make sure that this country continues to be a country of opportunty. I hope you will remember this as you return to your institutions because it is getting increasingly difficult to provide the necessary backing. But if you begin to rally those lobbies, then we will get some attention.

As my fellow-New Yorkers know, I resigned from Congress even though I had been re-elected with the highest percentage of votes any congressman received. A group of us had gone to visit President Sadat; he had just won a referendum with 92 percent of the vote and was very proud of himself. But my colleagues said to him, "You'd better talk to Badillo to show you how to win because he won with 98 percent of the vote in his last election." But I quit the Congress because nothing was happening there and nothing is happening now.

I went back to see my colleagues when the Middle East Treaty was signed and they all said that this has been the most boring session that Congress has had. There is no action on any important urban policy. There is some talk by Senator Kennedy about a health policy, but certainly nothing is going on in higher education. The reason is that they all get the message that the country does not want to fund anything else. They are not getting word back that we should take action to improve conditions in this country. That's why nothing has happened. They are all sitting around. They don't even speak very much in the Congressional Record – this has been the thinnest Congressional Record in the history of this country for the past forty years.

There is much to be done – if you will go out and do it. The only way to make sure we can get this country really moving again is to have an educated population that has the ability to carry out the necessary tasks. If that is done, then it will be possible to have meaningful collective bargaining. Whether it is done or not depends on what you and I and those of us who care about education do in the months and years to come.

# 8. SCOPE OF BARGAINING: IMPLICATIONS FOR TRADITIONAL FACULTY GOVERNANCE—I*

James P. Begin

*Rutgers University*

The purpose of this paper is to put recent developments concerning the scope of faculty bargaining into the context of past scope decisions of administrative agencies and the courts. Events in California, Michigan and New Jersey are particularly newsworthy. An assessment of the effect of public policy as represented by these decisions on traditional governance will also be made. In this connection, the assumption is often made that the preservation of traditional governance is best accomplished by sealing off from negotiations issues that relate to traditional governance. This assumption seems to be derived from an image of higher education as a community of self-governing scholars. Unfortunately, the literature indicates that this is not a reality.[1] Indeed, the vast majority of the unionized institutions do not appear to have been sites of substantial faculty governance.[2]

In this context, then, a more appropriate issue might be the extent to which public policy and collective bargaining practice facilities or hinders the development of traditional procedures where they did not previously exist. I will return to this point after reviewing what public policy tells us about the scope of bargaining in relation to traditional governance.

---

*Footnotes for this paper will be found on pages 55-6.

### The Bargaining Statutes and Traditional Governance

One interesting phenomenon of the public sector collective bargaining movement is that for the first time vast numbers of professional employees, including faculty, have entered into bargaining relationships. Is there embodied in the concept of professionalism a requirement that professionals, based on their special expertise, have a greater role in negotiations in determining policy than non-professionals?

A review of bargaining statutes covering faculty indicates that the statutes recognize no difference in the needs of various occupational groups, with the exception of California. It is clear that most states are following policies derived from the private sector in respect to definitions of terms and conditions of employment, including the Borg-Warner doctrine which divides topics into these categories: illegal issues; mandatorily bargainable "wages, hours and other terms and conditions of employment;" permissive issues wherein neither party can force the other to impasse.[3] There are recent developments in New Jersey and California, however, which deviate from this generalization.

### California – Statutory Limits

One way to limit the scope of faculty negotiations is by statute. Higher education administrators in several states have attempted to preserve traditional procedures in this way, for example, Montana and Wisconsin, but only California has successfully sealed off negotiations by statute.

For employees of the University of California, the statute excluded the following wide range of issues from negotiations:[4]

> 3. Admission requirements for students, conditions for the award of certificates and degrees to students, and the content and supervision of courses, curricula, and research programs, as those terms are intended by the standing orders of the regents or the directors.
>
> 4. Procedures and policies to be used for the appointment, promotion, and tenure of members of the academic senate, the procedures to be used for the evaluation of the members of the academic senate, and the procedures for processing grievances of members of the academic senate. The exclusive representative of members of the academic senate shall have the right to consult and be consulted on matters excluded from the scope of representation pursuant to this paragraph. If the academic senate determines that any matter in this paragraph should be within the scope of representation or if any matter in this paragraph is withdrawn from the responsibility of the academic senate, the matter shall be within the scope of representation.

The provisions covering the California State University and College system are similar, but do not prohibit negotiations over grievance procedures. These differences reflect the varying role of the senates at the California institutions. As indicated by Garbarino, "The Academic Senate at the university has had an unusually high degree of control over academic affairs for half a century. . . . It is particularly influential on academic personnel matters, including appointment, promotion and salary administration, although it is also effective in matters of educational policy."[5]

Given union opposition, it is not likely that similar statutory limitations will develop in many, if any, other states, particulary where bargaining statutes are already in place.

### New Jersey – No Permissive Category

The New Jersey Public Employment Relations Commission (PERC) interpreted the New Jersey public sector labor legislation in accordance with the Borg-Warner doctrine. However, the New Jersey Supreme Court in a recent decision dealing with the issue of teacher transfers and assignments ruled that the legislative intent of the bargaining statute did not expressly allow a "permissive" category of bargaining items.[6] Accordingly, all issues are either mandatory or illegal, with the formerly classified permissive issues now falling into the illegal classification.

The importance of this decision for other public jurisdictions, however, is that the Court went on to say that it might not be constitutionally possible for the legislature to establish a permissive category. The basis for this position was that to permit negotiations over issues involving management rights might undermine public control of government.[7]

> A private employer may bargain away as much or as little of its managerial control as it likes. However, the very foundation of representative democracy would be endangerered if decisions on significant matters of government policy were left to the process of collective negotiation, where citizen participation is precluded. This Court would be most reluctant to sanction collective agreement on matters which are essentially managerial in nature, because the true managers are the people. Our democratic system demands that governmental bodies retain their accountability to the citizenry.

The Court then proceeded to caution the Legislature:[8]

> The Legislature is of course free to exercise its judgment in determining whether or not a permissive category of negotiation is sound policy. We wish merely to point out that careful consideration of the limits which our democratic system places on the delegation of government powers is called for before any such action is taken.

The Court underlined its argument in a recent decision in which binding arbitration over the withholding of a merit increment was prohibited since "such a provision (binding arbitration) would in effect delegate government policy making to an individual who is not accountable to the public at large."[9] Advisory arbitration was permitted as an alternate input to the Commissioner of Education who has the final authority, by statute, on this issue.

The unions are now attempting to amend the bargaining legislation to include a permissive category, but in the meantime the impact of the decision on negotiations is being felt by the unions. In the recent one-day New Jersey State College strike, a major stumbling block to settlement was the state's desire to remove all permissive clauses from the contract, including clauses dealing with academic freedom (not removed), textbook selection (not removed), involuntary transfers (removed), course assignments out of area of competency (removed), qualifications for rank, promotional criteria and the criteria for evaluating tenured faculty (last three put in appendix not subject to binding arbitration but to return to contract if the Supreme Court decision is overturned by the legislature).

If the Supreme Court ultimately blocks the incorporation of a permissive category and other states follow suit, then the scope of negotiations could be substantially limited, as you will see when I discuss in more detail how specific issues have been dealt with the the neutral administrative agencies and the courts.

**Policy-Making Procedures**

Even without the California type of statutory protections for traditional governance, an analysis of scope determinations indicates that policy-making mechanisms such as senates and councils have been found to be permissive subjects of negotiations. Public and private administrative agencies alike have agreed that procedures for faculty participation in policy-development and policy-application activities are not mandatorily negotiable except to the extent that the procedures have an impact on terms and conditions of employment.[10] The rationale put forth for this outcome in the various decisions is that the employer has the right to determine how it wants to organize itself for making or applying policy.

University administrations have delegated and can continue to delegate managerial functions to faculty through a variety of mechanisms, but it remains the prerogative of the administrations to permit or not permit this type of delegation. Thus, the administrative agencies have found the following issues to be permissive and not mandatory areas for negotiations: governance procedures in general; 1966 AAUP statement on governance of colleges and universities, faculty participation in administration search committes or administrator evaluation; union appearances at governing board meetings; or faculty participation on boards.

I think it also can be implied from the decisions that the boards or commissions do not perceive that the existence of traditional governance mechanisms, per se, represents an attempt by the employer to undermine the collective bargaining process, that is, that senates are employer unions.

So, in sum, I think we can safely conclude that traditional policy-making procedures do not *have* to be the subject to negotiations. The decision is really in the hands of university administrators who, by and large, place a great degree of importance on preserving traditional procedures. What have they done with this responsibility?

Some institutions, like Rutgers University, have maintained the senate as a dual governance body outside negotiations. But the trend in collective bargaining-traditional governance interaction seems to be in the direction of the greater contractual delineation of faculty authority, including traditional governance mechanisms. Some institutions like Rider College and Fairleigh Dickinson University in New Jersey have incorporated complete governance procedures in the contracts which provide for broad faculty participation. Many other agreements provide for the formation of joint administration/faculty committees to handle various issues.[11]

In short, the parties increasingly are using the bargaining process to build policy-making procedures by marrying the contract and traditional governance in ways that are responsive to local needs. This is certainly a different outcome than had been predicted initially.

### Personnel Procedures

But all is not as the above discussion would indicate. While traditional policy-making procedures have not been generally supplanted by bargaining, the substance of traditional governance procedures is under pressure, particularly in the area of faculty personnel procedures. The pressure comes not from public policy, since in most scope determinations employers have not been required to engage in mandatory negotiations over many aspects of union, faculty or student participation in tenure and promotion committees, or over the criteria to be used in faculty evaluations. These generally have been classified as permissive topics of negotiations, although the impact would be mandatory.[12]

The exceptions would be New Jersey where they are now illegal (they were previously permissive until the permissive category was eliminated) and Michigan. In contrast to other jurisdictions, the Michigan Supreme Court, in what will likely become a landmark case involving Central Michigan University, concluded that the "elements, procedures and criteria involving evaluations for purposes of reappointment, retention and promotion are 'other terms and conditions of employment,'"[13] because they are "crucial to the employer-employer relationship."[14] The important aspect of the case is the implication that any matter which is "minimally a condition of employment"[15] will be mandatorily negotiable.

The impact of this decision on traditional governance should be clear to all. Compare the result of this decision with the New Jersey decision discussed above – the two states are certainly on the opposite ends of the continuum. The decision was split with the minority accepting the precedent established in other jurisdictions that it is the university's right to decide whether or not to delegate authority to faculty or other groups. The university has requested a rehearing in the case on several grounds. As in other jurisdictions, student participation was not found to be in the mandatory sphere of negotiations.

Whatever the guidance provided by public policy, many institutions have chosen to negotiate permissive personnel procedures and it is for this reason that prior jurisdictions of traditional governance have been threatened. To the extent that the creeping expansion of negotiations into grievance procedures, economic benefits, or permissive personnel areas previously dealt with by senates continues, then the pre-bargaining authority of the senates is diminished. To date, it is in these areas that traditional governance has been most affected.

### Other Issues

The possible authority of senates in other areas has been less affected. Not only have scope determinations found such matters as class size, curriculum, teaching methods, the budget, physical facilities, calendar, student policies, admissions and grading to be permissive (although the impact has been mandatorily negotiable),[16] but the parties for the most part have not dealt extensively with these issues in their contracts.[17]

## Conclusions

At this point we can draw the following conclusions from the evidence:

1. Statutory protections of traditional governance have not been widespread.

2. Governance procedures are permissive subjects for negotiation, but many parties have incorporated procedures into the contract.

3. The greatest impact on the role of traditional governance in decision making comes from the negotiation of personnel procedures, grievance procedures and economic benefits, even though some of these are only permissively negotiable. On the other hand, the clarification of the boundaries between traditional governance and collective bargaining through scope determinations and negotiations experience has probably stabilized traditional governance to some extent by clarifying the issues which can be dealt with by non-collective-bargaining procedures. For example, partly in order to provide a forum for non-negotiable issues, three two-year colleges in New Jersey revived traditional governance procedures after the previous procedures had been dismantled when collective bargaining was initiated.[18]

Whether in the long run the more limited jurisdictions of traditional governance will retain faculty interest is a question we cannot really answer at this point. Additionally, the bifurcation of some issues may cause some problems in the future. For example, the scope of tenure (university wide or department) has been found to be a mandatory issue of negotiations while other aspects of the tenure process such as the criteria to be used have been found to be permissive topics.[19] For reasons of efficiency, employers may find it easier to use only the bargaining process to make changes in tenure procedures, thus reducing the role of traditional governance.

To date, however, we are still a long way from a union model wherein the union officers represent all interests of the faculty. What appears to be evolving instead are situations where bargaining supplements traditional procedures or makes provision for them where they did not previously operate effectively or were non-existent. *Generally*, the emerging legal environment does not seem to have interfered with the parties' creativity in shaping solutions which reflect past traditions and current problems at particular institutions.

## FOOTNOTES

[1] Even though Garbarino (p. 70), using 1969 AAUP survey data, found that unionized institutions on average had higher levels of faculty participation, the response bias of the AAUP survey data, when coupled with the small differences in the level of governance between union and nonunion institutions indicated by the AAUP data, makes his conclusion subject to question. Furthermore, if the 1969 AAUP survey is an accurate depiction of reality, and the results are likely an overstatement of the level of faculty participation due to the over-representation of prestigious institutions, then the general level of faculty participation in this country has been low. Even in the area of personnel decisions, Garbarino interpreted the AAUP data as indicating the "faculty dominance in personnel decisions does not apply to large absolute numbers of institutions" (p. 37).

54

[2] In New Jersey none of the unionized public state and community colleges had a long tradition of governance prior to bargaining. For other examples, see Frank R. Kemerer and J. Victor Baldridge, *Unions on Campus*. San Francisco: Jossey-Bass Publishers, 1975; Walter J. Gershenfeld and Kenneth P. Mortimer, *Faculty Collective Bargaining Activity in Pennsylvania, The First Five Years (1970-1975)*. Center for Labor and Manpower Studies, Temple University and Center for the Study of Higher Education, Pennsylvania State University, 1976, and Kenneth P. Mortimer Richard D. Richardson, Jr., *Governance in Institutions with Faculty Unions: Six Case Studies*. University Park, Pa.: Center for the Study of Higher Education, 1977.

[3] NLRB v. Wooster Division of Borg-Warner Corporation, 356 U.S. 342 (1958).

[4] *Government Employee Relations Report*, Bureau of National Affairs, 51:1418E (January 22, 1979), p. 7.

[5] Joseph W. Garbarino, *Faculty Bargaining and Proposition 13 Come to California*, Reprint No. 4, Faculty Unionism Project, Institution of Business and Economic Research, University of California.

[6] *Ridgefield Park*, 4 NJPER 4164, September 11, 1978.

[7] *Idem.*

[8] *Idem.*

[9] Board of Education of the Township of Bernards, Somerset County v. Bernards Township Education Association and American Arbitration Association, NJEA and Samuel Ranhand, Supreme Court Docket No. A-49.

[10] For example, see *Board of Higher Education of the City of New York*, 7 P.E.R.B. 3042 (1974); *Rutgers University*, 2 New Jersey P.E.R.C. (1976); *Saint John's University*, New York 89 L.R.R. 200 (1975).

[11] For example, see Kenneth P. Mortimer and G. Gregory Lozier, "Contracts of Four-Year Institutions." In Duryea, E.D.; Fisk, Robert S., and Associates. *Faculty Unions and Collective Bargaining*. San Francisco: Jossey-Bass, 1973, pp. 108-29.

[12] For example, see *Board of Higher Education of the City of New York*, 7 P.E.R.B. 3042 (1974); *Board of Trustees of Middlesex County College* (N.J.) and *Local 1940, American Federation of Teachers* (AFL-CIO), P.E.R.C. Case No. 78-13; *County College of Morris (N.J.), P.E.R.C. Case No. 77-64, 3 NJPER 165 (1977); and* Orange County Community College Faculty Association, New York P.E.R.B. Case No. U-2137 (1976).

[13] State of Michigan Supreme Court, Central Michigan University Faculty Association v. Central Michigan University, No. 59753, *Government Employee Relations Report*, Bureau of National Affairs, 796:31-33, (February 5, 1979), p. 32.

[14] Ibid., p. 33.

[15] *Idem.*

[16] For example, see *Rutgers University*, 2 New Jersey P.E.R.C. (1976); *Orange County Community College Faculty Association*, New Yotk P.E.R.B. Case No. U-2137 (1976); *Burlington County College Faculty Association v. Board of Trustees, Burlington County College*, 64 N.J. 10 (1973); and *Board of Trustees of Middlesex County College (N.J.) and Local 1940, American Federation of Teachers* (AFL-CIO), P.E.R.C. Case No. 78-13.

[17] This conclusion is based on the author's review over the years of numerous faculty contracts.

[18] Begin, James P.; Settle, Theodore C.; and Berke-Weiss, Laurie. *Community College Collective Bargaining in New Jersey*. New Brunswick, N.J.: Institute of Management and Labor Relations, Rutgers University, 1977.

[19] *Rutgers University*, 2 New Jersey P.E.R.C. (1976).

# 9. SCOPE OF BARGAINING: IMPLICATIONS FOR TRADITIONAL FACULTY GOVERNANCE—II

Jerome Lefkowitz

*New York Public Employment Relations Board*

We just heard this morning that bargaining is dead, at least in the Second Circuit, and soon perhaps for the nation as a whole. If that's so, why discuss what could have been bargained about in the past?

Regardless of what the Supreme Court does in the *Yeshiva* case, a very high proportion of the negotiations now going on at the university level are not taking place under the National Labor Relations Act. They are being conducted under various state statutes because they relate to state, municipal and community colleges. What will be determined by the Supreme Court will have some but no great impact upon the application of state laws by state agencies or state courts because the laws are different. For example, in New York State, as in many states, supervisors are not excluded. Even if the Supreme Court decides that faculties consist of supervisory employees and are therefore excluded from the National Labor Relations Act, they would not be excluded from many state laws. We have a large number of community colleges under our jurisdiction, and I would defy even as good a lawyer as Saul Kramer to come up with a convincing rationale for the view that faculty is managerial at many of the community colleges.

## The Issue of "Discretion"

Speaking as the deputy chairman of an agency that writes scope decisions, let me begin with a few generalizations about scope of negotiations. The unsophisticated employer comes to us and says, "We don't have to bargain about that because it's within our discretion." Immediately he has gotten his wrong foot forward. It may be stated categorically that the only matters on which the employer does negotiate are those over which he has discretion. If the law says, "Thou shalt do such and such and thou mayest not do something else," that's the law, and there is no point in negotiating about it. There is an exception in some states like Connecticut that permit a contract to supersede the law. In general, however, negotiations are only over those things in which, but for the union, the employer would have discretion and could do what he wants to do.

Now within that category not everything is negotiable. There is a balancing test to which Jim Begin alluded in speaking about the Central Michigan University decision. Certain things that are within the discretion of the employer are exclusively within its discretion or predominantly within its discretion to such an extent that agencies like the Public Employment Relations Board have held that they are not mandatory subjects for bargaining. We do a balancing test. We say, "Is it predominantly a matter of concern to employees and a term and condition of employment?" That's the magic phrase, "terms and conditions of employment." Almost anything can be a term and condition of employment, but is it predominantly that or is it predominantly that other magic word, management prerogative?

## Class Size

Let me give you an example of that balancing test as it was applied by the Public Employment Relations Board in many other states. Clearly class size is a term and condition of employment. If you have taught a class, you know that the more students you have, the more work you have. You have more papers to mark, more students to give you a headache, all kinds of problems. Workload is a term and condition of employment.

On the other hand, there may be, as the Public Employment Relations Board in New York State has found, important managerial considerations. For example, suppose a school district decides that "our senior class will be going to college next year where they will have lecture classes with hundreds of students; we want them to be exposed to this kind of super-large class and therefore, we want large classes because it will serve an academic, educational function." That's an educational judgment.

How do you balance between the one and the other? This is the problem of agencies like mine. Once we decide it's in the employer's discretion, we then must weigh the policy issue because it is educational policy, public policy, and this is for the employer to decide. Working conditions, terms and conditions of employment, are issues for employee negotiation. We must therefore apply various tests. Jim Begin has discussed some of them. The states may vary, but essentially almost any state that's been in the collective bargaining business for a while has had to provide answers and guidelines in defining what is or is not a mandatory subject in negotiations.

## The Limits in Government

The problem, however, is more acute in the public sector. Again, as you were told before there is the problem of public control over government. In the private sector the employer can do anything he wants to except what is withheld from him. But governments are creatures of statutes, except where the state itself is limited by the federal government, and they can do only what statute authorizes them to do.

So you have the question of whether or not a government is allowed to agree to certain things even if it is willing. This question has been more prominent in some states like New Jersey than in others. In New York, the courts have ruled that government may agree to a wide range of things even if it doesn't have to negotiate about them, and may thus bind itself by contract. Government may negotiate over the size of classes. Government in New York State may negotiate presumably over textbook selections and over admission policies, and if they reach an agreement, they are held to that agreement.

The resulting provisions can be enforced in New York State but not in New Jersey, and the policy arguments are clear to the extent that governments or government colleges permit themselves to lock a subject up. A contract with a union may exclude other groups – parent groups, student groups, community groups – that may have a valid and vital interest in the same subject. The standard argument, it is quite compelling, is that there is a more immediate interest on the part of faculty. Faculty not only have a general citizen interest, vis-a-vis all these subjects; they have an additional interest, a contractual one based upon their employment.

### Circumventing Narrowness of Scope

Let me point out that even when something is not a mandatory subject of negotiation, and perhaps even when it is prohibited, an intelligent and imaginative union negotiator may find it possible to get around the rule. It is not enough for the employer to argue, "I've got a decision from the Public Employment Relations Board saying that it is not mandatory, and therefore, I'm not going to talk about it. I can go home. You knock your head against the wall." He's going to find himself caught up short because imaginative negotiations can convert non-mandatory into mandatory subjects without too much difficulty.

Take the example I used before – class size. The issue may be non-mandatory because it has to do with an alleged educational judgment that favors large classes. But workload is clearly mandatory, and the union negotiator comes to the table asking for premium pay when there is a larger number of students in the class. Thus many subjects that are not mandatory can, with some imagination, be converted, in effect, into a mandatory subject because money is always negotiable. If the employer's reason for not negotiating is to save money, the union can get at the pocketbook. On the other hand, management may do better if the issue is dollars, because the union can't do as well on an additional cost front if money is on top of the costs involved in the original pay demand . So management may be better off forcing the union to convert the demand into dollars.

Because the union can get to it, particularly in a state that permits the negotiation of non-mandatory subjects, I think administration is well advised to reconsider before it says, "No, we won't bargain about it." If what's really bothering your employees is class size or textbook selection or matters of that type, you're better off talking about it unless as a matter of basic principle you really have to object to it. If your only interest is saving money, you're going to bargain about the money anyhow, and you're not going to address yourself to the problem that is really bothering your people. As long as you're bargaining anyhow, you're probably better off.

Moreover, it is noteworthy that professional employees often make job and career decisions for reasons that have little to do with bread and butter issues. Among professionals, job statisfaction is really a term and condition of employment, and this must be balanced against the concern about public control of government or public control of a public institution like a college.

### Alternative Models

Where does this leave us? We have several models. We have talked about the union model, which has not been adopted completely in many places and may not be the model of the future. The union model is one in which we treat a college faculty member like any other employee. He can negotiate over terms and conditions of employment, which is itself a term of limitation. Other things he may not negotiate about, and they are left to the employer to handle as a management prerogative.

Under this model, one option might be the elimination by law of faculty senates. The faculty senate is an employee organization; I think that would be pretty clear under the National Labor Relations Act, depending to some extent on what the faculty senate is doing and its structure. Where a faculty senate gets involved in matters that border close to bargaining, as in Pennsylvania where an action was brought on one occasion, the ultimate result might be the disestablishment of the particular faculty senate if it is used to resolve issues that are essentially matters of collective bargaining.

A second model is the faculty senate or faculty governance model. It is a model that is being preserved at a number of what are called the "mature institutions." A number of the more prestigious institutions have resisted negotiations.

In general, there is a problem of coexistence between governance by senate and collective bargaining by the union. New York State had a case in 1974, involving the City University of New York. CUNY was going to bring students onto Personnel and Budget Committees, and the union wanted to bargain to preclude this. The Public Employment Relations Board determined that the composition of committees, and indeed the entire committee structure, was a matter of governance and not a term and condition of employment. In this decision, the Board dealt with the relationship of governance to bargaining and the relationship of the faculty member to both institutions. It reached the conclusion, with a dissent in a two-to-one vote, that the faculty member is both an employee and a part of management; at least he exercises certain managerial and supervisory functions on behalf of the employer.

The Board said that the college professor or faculty member can be on both sides of the bargaining table but the union could not. He is relegated to his union for those things and only those things that are traditionally handled by unions, whether they represent blue-collar employees or professional employees. He is represented by his faculty governance organization, if there is one, for those other matters which are to be dealt with separately.

In general, there is a problem of coexistence between governance by senate and collective bargaining by the union. New York State had a case in 1974, involving the City University of New York. CUNY was going to bring students onto Personnel and Budget Committees, and the union wanted to bargain to preclude this. The Public Employment Relations Board determined that the composition of committees, and indeed the entire committee structure, was a matter of governance and not a term and condition of employment. In this decision, the Board dealt with the relationship of governance to bargaining and the relationship of the faculty member to both institutions. It reached the conclusion, with a dissent in a two-to-one vote, that the faculty member is both an employee and a part of management; at least he exercises certain managerial and supervisory functions on behalf of the employer.

The Board said that the college professor or faculty member can be on both sides of the bargaining table but the union could not. He is relegated to his union for those things and only those things that are traditionally handled by unions,

whether they represent blue-collar employees or professional employees. He is represented by his faculty governance organization, if there is one, for those other matters which are to be dealt with separately.

Obviously, when you get close to the line, the problem of how the administration is to relate to one or to the other can become difficult. Up to this point it appears that the lines have been rather clear, without too much confusion in New York State, though some of you who have been living under the law may have a different perception than I do from where I sit.

This is where we are in New York State. The position is that governance and unionization are to exist side by side in separate spheres and that it is our job as the agency, on a case-by-case basis, to draw the lines. Whether in the long run this will generate too much confusion to be valuable, I can't say. But it's clear that scope of bargaining in government generally is different from what it is in the private sector, and scope of bargaining in education and particularly in higher education is different from what it is in the factory. The experience of the National Labor Relations Board and the private sector agencies has limited relevance. It is our function as practitioners, as people living under the rules, to try to come up with a system that works better.

## 10. WHAT DOES THE CONTRACT COST IN DOLLARS AND CENTS?

Gerald L. Dorf, Esq.

*Labor Relations Counsel, N.J. State League of Municipalities.*

*(Editorial Note.* The following outline of the remarks made by Mr. Dorf provides an effective checklist for negotiators in costing out the items considered at the bargaining table.)

**I. Introduction**

A. Education is a labor intensive industry.
B. Labor costs in education are higher than in other industries.
C. Fringe benefits are hidden.
  1. Often overlooked.
  2. Have the same effect on labor costs as salaries.
  3. Rising at a rapid and virtually uncontrolled rate.
    a. U.S. Chamber of Commerce employment benefits study of one hundred fifty-two (152) companies.
    (1) 1955 – twenty-two and seven tenths (22.7%) percent of payroll; 1975 – forty and three tenths (40.3%) percent of payroll.

b. 1977 National Survey of Employee Benefits – Full-time Personnel of U.S. Municipalities.
   (1) Forty-six (46%) percent for sworn personnel (i.e., policemen and firemen).
   (2) Forty-two and seven tenths (42.7%) percent for general personnel (i.e., sanitation and all others).

## II. Costing Union Demands in Collective Bargaining

A. Determining present labor costs prior to commencement of collective bargaining – four (4) types of compensation:
   1. Direct payments based on time worked – overtime, shift differentials, call-in pay.
   2. Direct pay for time not worked – holiday pay, vacation pay, personal days, sick leave.
   3. Benefits not necessarily paid to employees – health insurance and pension payments.
   4. Benefits which are statutory – unemployment compensation tax, state disability tax, social security.

B. Basis for costing union demands.
   1. Total annual cost.
   2. Cost per employee per year for all employees.
   3. Percentage of payroll.
   4. Cents per hour.

C. Roll-up costs – wage related costs which increase "automatically" as salaries are increased.
   1. Personal leave.
   2. Vacation pay.
   3. Premium pay.
   4. Social security, workmen's compensation.
   5. Pension.
   6. Sick leave.
   7. Holidays.
   8. Bereavement leave.

D. Other "roll-up type" costs which increase without union seeking changes are:
   1. Longevity pay based upon percentage.
   2. Health and welfare insurance and similar benefits where a benefit and not a cost maximum has been negotiated.

## III. Controlling Costs

A. Negotiate cost of benefit not benefit per se – i.e., a lid.

B. Avoid benefits which increase automatically – i.e., percentage longevity payment.

## IV. Techniques for Limiting Settlement Costs

A. Percentage increase versus flat dollars.
   1. Percentage increase spreads dollar differential.

2. Flat dollar increase narrows dollar differential.
3. If possible, alternate or change over a period of years.

B. Compounded versus non-compounded raises.
   1. Two (2) year agreement providing for seven (7%) percent and seven (7%) percent compounded – cost is fourteen and forty-nine hundredths (14.49%) percent.
   2. Two (2) year agreement providing for seven (7%) percent and seven (7%) percent non-compounded – cost is fourteen (14%) percent.

C. Front loading versus back loading (assume a ten thousand ($10,000) dollar salary).
   1. Two (2) year agreement providing for a five hundred ($500) dollar increase the first year and six hundred ($600) dollars the second year – total new dollar cost over two (2) years is sixteen hundred ($1,600) dollars.
   2. Two (2) year agreement providing for a six hundred ($600) dollar increase the first year and five hundred ($500) dollars the second year – total new dollar cost over two (2) years is seventeen hundred ($1,700) dollars.

D. Split raises.
   1. Four (4%) percent raise January 1 and four (4%) percent raise July 1 – total cost for that year is six (6%) percent. However, there is a two (2%) percent (deferred) increase in the base rate commencing January 1 of the next year.
   2. Four hundred ($400) dollar raise January 1 and a four hundred ($400) dollar raise July 1 – total increase for that year is six hundred ($600) dollars. However, there is an additional two hundred ($200) dollar (deferred) increase in the base rate as of January 1 of the following year.

## V. Conclusion

A. It has been said that collective bargaining is too important to be left to labor relations specialists.
   1. Collective bargaining decisions affect all other aspects of any organization.
   2. Labor relations specialists must become familiar with costing techniques although the actual work may be performed by persons with a more comprehensive financial background.

B. Fringe benefit expenditures constitute a vast and growing portion of total labor relations costs.
   1. Fringe benefit costs must be identified and management receive "credit" for these benefits at the bargaining table.
   2. Automatic increase in fringe benefits should be limited where possible.

# 11. THE BURDEN OF COMPLIANCE WITH FEDERAL REGULATIONS

Carol Herrnstadt Shulman

*ERIC Clearinghouse on Higher Education*

Historically, the federal government has assisted higher education institutions in their missions of teaching, research, and community service because it recognizes that these objectives also serve national needs for a highly trained and informed citizenry. These federal aid programs have made major contributions to the growth and development of colleges and universities over the past twenty years.

But currently federal officials and the higher education community have not focused on this positive partnership. Instead, they have quarreled over the way federal aid-to-education programs are also used to accomplish other federal goals: nondiscrimination, equal education, and equal employment opportunities. College officials charge that requirements for these civil rights goals interfere qualitatively and economically in the internal life of an academic community.

The higher education community also recognizes that as a major business, employing about 1.5 million people, they are subject to federal laws and regulations governing employment activity. These employment-related obligations create economic problems that more adversely affect higher education institutions than traditional business enterprises because of their distinct financial and employment structures.

In the past fifteen years, higher education officials have seen academic and economic pressures resulting from regulatory problems evolve and intensify. Two problem areas have been identified: (1) growing conflict over regulations resulting from government support of higher education, and (2) an economic burden for academic institutions resulting from federally mandated employment obligations.

## The Effect of Civil Rights

Federal efforts to achieve civil rights goals through programs of support for higher education are a logical consequence of the context in which the higher education legislation was enacted. During the 1960's, civil rights activists made the concepts of nondiscrimination and social justice national concerns. Schools and colleges were singled out as social institutions that had the potential to remedy past injustices by providing upward mobility through better and more extensive educational opportunities (Gladieux and Wolanin, 1976).* This idea was translated into the Higher Education Act of 1965, which gave substantial federal support to colleges and universities (Gladieux and Wolanin, 1976). The Education Amendments of 1972, amending the 1965 Act, extend and enlarge upon this concept, making equal educational opportunity "the central commit-

---

*For full references and footnotes, see page 84 *et seq.*

ment of federal higher education policy" (Gladieux and Wolanin, 1976, p. 224). This legislation implemented the equal educational opportunity commitment by channeling most support for higher education through programs for student assistance. As a result, the proportion of federal aid for higher education targeted for student assistance increased from 47.6 percent in 1967 to 83.1 percent in 1977 (Golladay and Noell, 1978).

This strategy has had major significance for higher education because it indissolubly links government support for higher education with civil rights concepts that developed during the 1960's. In other words, federal assistance to all recipients is conditioned on the recipients' agreement to abide by laws and regulations implementing civil rights commitments, or they risk losing their federal aid. Under the 1972 Amendments, virtually all colleges and universities in the country are recipients and therefore enter into this arrangement. In the federal view, this is an appropriate relationship.

Federal legislation regulating the employer's personnel practices have also emerged out of concern for achieving social justice. This effort dates back to the 1930's, with the passage of legislation such as the Social Security Act, but the last ten years have seen a rapid acceleration in the federally-mandated social costs an employer must bear, e.g., unemployment compensation, new mandatory retirement age limits, Social Security increases (Van Alstyne and Coldren, 1976). These laws apply to all employers, but specific exemptions have been made in some cases for nonprofit institutions or agencies of state governments. These state agencies may be subject to state requirements in lieu of the federal law.

### Academic Response

Higher education officials have seen academic and economic pressures resulting from regulatory problems evolve and intensify since the 1960's. *They bebelieve they are now in a critical period in their relationship with government agencies and Congress: either they will work out their regulatory problems or colleges will become so inundated by federal requirements that they will be unable to accomplish their primary purposes.* To resolve this crisis the academic community is working to inform itself and Congress about the real impact of federal requirements on institutions' academic processes and economic conditions.

This paper examines information that has resulted from these endeavors. The paper contains three sections: section one discusses regulatory impacts on colleges' academic processes; section two describes economic impacts of federal laws and regulations; and the final section focuses on the regulatory process itself, i.e., its overall impact, and includes recommendations for making the process more sensitive to the needs of higher education.[1]

### Regulatory Effects on Academic Life

Colleges and universities are subject to regulations on nondiscrimination and equal opportunity if they are recipients of financial assistance. When identifying "recipients" regulations typically exclude students receiving federal assistance from their definition for compliance purposes, but the subsequent transferees of this aid, e.g., any sector of the college community, are classified as "recipients" and must comply with all regulations. Further, the entire college community comes under regulation if any sector is affected. Therefore, "recipient" is such a broadly defined term that virtually all colleges and universities meet its definition.

The three federal civil rights regulations that have affected or have the most potential to affect the academic community are:

1. Executive Order 11246, as amended, which bars federal contractors from discriminating in employment on the basis of race, color, religion, national origin, or sex. It also requires the contractor to take "affirmative action in all employment procedures and practices."[2]
2. Title IX of the Education Amendments of 1972, which prohibits sex discrimination in all educational programs and activities receiving federal financial assistance.
3. Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of handicap in all educational programs and activities receiving federal financial assistance.

## The Laws and Regulations

An introduction to the three laws discussed in the section—their origins and their implementing regulations—is necessary background to understanding their impact on academic life today. From the beginning, these laws have been sources of controversy in the higher education community, and time has not remedied this difficulty.

### Executive Order 11246, as Amended

Executive Order 11246, issued in 1965, reflects the national commitment to social justice developed during the 1960's. It prohibits federal contractors from discriminating on the basis of race, color, religion, or national origin; and it requires contractors to take "affirmative action" to insure that discrimination does not occur in employment situations. It was amended in 1967 (Executive Order 11375) to include sex as a protected class. The Order applies to a sizeable but uncalculated number of colleges. Contractors must agree to abide by the requirements of the Executive Order if they administer contracts totaling $10,000 or more in a 12-month period, and must have a written compliance plan if they administer one or more federal contracts totaling $50,000 or more. They are also subject to a pre-award compliance review before they can receive a federal contract for $1 million or more ("Equal Employment Opportunity. . .," 1977). The $10,000 ruling is a relatively new addition to the Executive Order, and may be important for institutions with small federal contracts who heretofore have not been covered by the order ("Small Contractor. . .," 1978).

But the Order's importance for higher education did not become clear until 1970, when the Women's Equity Action League filed a class action complaint with the U.S. Department of Labor against all colleges and universities covered under the Executive Order. This action eventually brought federal investigators on college campuses.

The Executive Order is implemented by Revised Order No. 4, regulations developed by the Department of Labor for all federal contractors. The Department of Labor delegated responsibility for implementing the Order for higher education to the Department of Health, Education, and Welfare, Office for Civil Rights.

The Revised Order explains the affirmative action concept and describes how affirmative action in the workplace is to be achieved. However, the Revised Order was not written specifically for colleges and universities, but for all industries in the United States. To adapt it for use by colleges and universities, the Department of Labor and HEW's Office for Civil Rights devised a set of guidelines that may be followed by higher education institutions in developing affirmative action plans. This "Format for the Development of an Affirmative Action Plan by Institutions of Higher Education" (1975) employs the terminology found in the Revised Order, but also makes reference to specific issues for college administrators to consider. The Format includes three basic areas: "a work force analysis, a utilization analysis, and goals and timetables, including 'specific and detailed action oriented programs,'" (Gerry 1975,p.2). These areas are explained in academic terms. For example, under the heading of "work force analysis," which requires an institution to provide a complete listing of its "job titles," the Format advises that an institution may combine departments having similar disciplines into one grouping; e.g., "Physical Sciences" might include astronomy, astrophysics, chemistry, geology, and physics ("Format. . .." 1975, p. 7). Faculty titles may then be listed within this broader aggregation.

But it is difficult to calculate how useful the Format has been to administrators because it was not published until four years after the Revised Order. By that time, most institutions had had to develop affirmative action plans on their own, relying on a network of interinstitutional information, organizational assistance from higher education and women's groups, and often confusing or conflicting guidance from regional OCR offices. Nevertheless, the Format was an unusual boost from the government; noneducational contractors have not received this type of guidance ("Colleges Must Have. . .," 1978). The fact that it was produced may indicate that college administrators have made a case that colleges are significantly different from other employers and therefore require special government consideration.

### Title IX

Title IX of the Education Amendments of 1972 is a legacy of the 1960's concern for social justice; it is patterned after Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race or ethnic origin in education agencies and institutions. It reflects a more recent public consensus that sex discrimination must be prevented. Accordingly, it prohibits discrimination on the basis of sex in any education program or activity receiving federal assistance. With certain exceptions,[3] Title IX applies to every college and university in the country, since virtually all institutions enroll students receiving assistance under other provisions of the 1972 Amendments.

Title IX regulations, effective July 1975, require institutions to take several steps to insure nondiscriminatory treatment. First, the institution must prepare a written self-evaluation of its policies and activities to determine where any discrimination occurs. This had to be completed by July 1976. All areas of student life are included in this self-evaluation, e.g., admissions, financial aid, and educational programs and activities. Second, based on this self-evaluation, the institution must develop a plan detailing modifications and remedial actions that need to occur in order to eliminate discriminatory policies and practices, and to overcome the effects of past discrimination. Third, the regulations require the institution to assign at least one employee the responsibility for coordinating the institutions' Title IX compliance efforts and for investigating any complaints of noncompliance or violation of the Title IX regulations. And fourth, institutions must develop and adopt grievance procedures for students and employees to deal with charges of Title IX violations.

### Section 504

Like Title IX, Section 504 of the Rehabilitation Act of 1973 is another federal effort to insure that concepts of nondiscrimination and social equity are extended to a group in society that has suffered from discrimination. Section 504 prohibits discrimination on the basis of handicap in any program or activity receiving federal financial assistance. Procedures for compliance with Section 504 ("Nondiscrimination on the Basis of Handicap. . . ," 1977) are modeled on Title IX regulations, and touch on all aspects of academic life.

### Compliance

In theory, the relationship between federal agencies and the higher education community is voluntary; all colleges have the option to refuse aid. If they were able to do so, they would not have to abide by the provisions of the laws discussed here. But, in fact, "voluntary" participation is illusory for virtually all institutions because federal aid is a vital component in their budgets. In 1978, estimated federal funds for higher education are more than $10.8 billion. This figure includes: more than $8 billion for basic higher education support; nearly one-half billion dollars for all loans; and $2.3 billion for applied research and development (Vance and Lind, 1978, p. 159).

Given this massive dependence on federal funds for their continued operations, colleges and universities are particularly vulnerable to threats that the funds may be discontinued. The suspension of all or some portion of federal monies may occur if HEW's Office for Civil Rights (OCR) finds that an institution has not complied with civil rights requirements in one or more of its programs. This approach to enforcing compliance has been criticized by the higher education community because it harms those sectors of an academic community that are in compliance with civil rights requirements and by protected groups because suspension is such a serious step that the government has never totally cut off funds from an institution.

In a very real sense, however, there are interim procedures that are used to achieve compliance. These are the protracted negotiations involving federal investigators and campus representatives over whether institutional compliance efforts meet federal standards. These negotiations may serve as a goad to institutional compliance because they are costly to conduct and may in fact delay the receipt of some federal funds. Protected groups, such as women, charge that the negotiating process delays and has been used to deny equitable treatment to the protected classes. This section examines higher education's experience with compliance procedures, as they have occurred under the Executive Order, Title IX, and Section 504.

**Enforcement Procedures**

Federal investigators in HEW's Office for Civil Rights have enforced Executive Order 11246 through the compliance review process and investigation of complaints. Under the review process, investigators visit institutions to determine whether an affirmative action plan has been developed that meets Revised Order No. 4 requirements and whether the institution is implementing its plan. Investigators also visit institutions to investigate complaints of noncompliance with the Executive Order. OCR has frequently been criticized by colleges and women's organizations for its alleged mismanagement of both these enforcement processes. Criticism focuses on several major areas:

(1) *Notification of a review.* OCR notifies an institution in writing that it will be subject to a review within three to four weeks. Institutions contend that they need more time to prepare for the review; women's groups argue that they are not notified of the review and therefore are deprived of the opportunity to furnish HEW with relevant information.

(2) *Burden of proof.* Generally, the woman or group filing a complaint does not have to provide an extensive amount of information to compel HEW to begin an investigation. Administrators therefore feel that at the beginning and during the course of the complaint process they bear an unfair burden of proof. HEW, however, denies that there is a presumption of guilt or innocence when a review is initiated (Shulman 1972).

(3) *Access to personnel records.* HEW and the universities have experienced their greatest conflict over the on-campus investigation process that is the backbone of compliance review. The universities question HEW's right to have full access to personnel records. HEW contends that it derives this authority from the Executive Order itself (Executive Order 11246 (B) (202) (5)).

The pre-award review process for recipients of large government contracts may also present difficulties that affect all aspects of an institution, although contracts may be pending with only one sector. For example, the University of California at Berkeley was involved in a controversy with OCR in May 1978 over its certification for eligibility to receive a $1.5 million Office of Naval Research contract. At issue were the department of history's refusal to provide information on all people who wrote letters of recommendation, and the art history department's refusal to let investigators copy records relating to a possible sex discrimination (Fields, 1978a). Because OCR believed it could not determine compliance status without this information, the university was threatened with the disruption of research at its Naval Bioscience Laboratory, which needed the contract to continue operating. Under an "interim agreement" between OCR and Berkeley, reached one week after the deadline for compliance certification, OCR agreed not to copy personnel files on job applicants and the university obtained permission to disclose the sources of letters of recommendations. The contract was then awarded (Fields, 1978b).

OCR and higher education institutions also have clashed in the pre-award process, providing a classic example of bureaucratic procedural problems. Early in June 1975, OCR told twenty-nine universities that it would withhold more than $65 million in federal contracts unless they produced acceptable affirmative action plans by the end of the fiscal year on June 30. Alternatively, OCR suggested that these institutions could promptly receive their contracts if they adopted a model affirmative action plan, which was widely believed to be based on the University of California at Berkeley's plan (Fields 1975a). OCR explained that the haste involved in the review process occurred because it had only recently learned that these institutions were to be awarded the contracts. After extensive protest from the presidents of the affected universities, the Department of Labor and HEW developed an arrangement under which most of the institutions received their contracts and the universities agreed to submit new affirmative action plans within thirty days of the agreement. Other affected institutions worked out separate agreements (Fields, 1975b).

Dissatisfaction with OCR's enforcement proceedings on Title IX and the Executive Order resulted in a suit by the Women's Equity Action League against the Department of Health, Education, and Welfare. In a negotiated agreement reached in December 1977, HEW adopted timetables and procedures for handling individual complaints, compliance reviews, and pre-award reviews for contracts over $1 million.[4] OCR also announced, among other matters, its intention to process 120 sex discrimination complaints and to conduct a minimum of fifty-five on-site compliance reviews, including pre-award reviews under the Executive Order. This agreement is reflected in OCR'S "Annual Operating Plan for FY 1978 ("Nondiscrimination in . . .," 1978).

From this review of the compliance process, it appears that the higher education community as a whole has not had extensive experience with compliance reviews. Van Alystyne and Coldren (1976) theorized that the brunt of compliance activity has been borne by a limited number of colleges and universities, which are large and prestigious and therefore attract both public and federal interest in their compliance activities. Their compliance efforts tend to establish policies and procedures for the higher education community as a whole.

But even higher education's limited experience with the compliance process is revealing. It indicates that the compliance process does not proceed in an orderly fashion, but rather is subject to the uncertain reactions of the different interest groups involved. In fact, it is a political process and requires institutions and different interest groups in the higher education community to master new political skills. The compliance process therefore engages a substantial number of people in academic life in activities that are frequently acrimonious and tedious. In this way, the compliance process itself intrudes on the academic life of the university.

Title IX regulations ("Nondiscrimination on the Basis of Sex," 1975) establish the federal intention to leave to the institutions the initial responsibility for determining their compliance status and for initiating remedial and affirmative action to achieve compliance. Federal oversight and intervention is the final step in the monitoring process, following institutional action. The purpose of this approach appears to be to keep federal involvement in Title IX procedures to a minimum (Weinberger, 1975).

The regulations make the self-evaluation process the major method for achieving compliance with Title IX. The federal government's involvement with Title IX enforcement occurs in one of two ways. First, by September 30, 1976, OCR was to receive and then review an institution's "assurance" form. This is a government checklist by which an institution indicates its compliance status in the areas of: campus grievance procedures; appointment of a Title IX coordinator; status of the self-evaluation; institutional modifications to achieve compliance; and remedial activities (Shulman, 1977). Institutions that did not return assurance forms or did not complete them satisfactorily are subject to compliance investigation. Second, OCR is required to investigate and resolve complaints of Title IX violations that are filed against an institution. As a final step in this enforcement process, OCR may discontinue federal funds to an institution.

As with affirmative action compliance, women's groups have been extremely dissatisfied with OCR's Title IX enforcement program. The National Coalition for Women and Girls in Education, an organization concerned with the implementation and enforcement of Title IX, has charged HEW with widespread failure to implement the law's regulations on the elementary-secondary and higher education levels (National Coalition, 1978). In response, HEW Secretary Joseph Califano admitted that bureaucratic ineptness had created a substantial backlog of unreviewed complaints, and he reported that these problems were being dealt with.

*Section 504.* At this writing, efforts to obtain information from the Office for Civil Rights on the procedures that will be followed to monitor and enforce compliance with Section 504 have proven fruitless. It seems fair to surmise, however, that OCR will conduct 504 compliance in a manner similar to that followed for Title IX.

## Effects on Institutional Life

Critics of federal efforts to achieve social goals in higher education through the regulatory process charge that the quality of academic life is being impaired by colleges' needs to respond to requirements that are insensitive to or inappropriate for their organization, procedures, and financial circumstances. Moreover, these requirements are costly to the institution, making their implementation seem doubly burdensome. Revised Order No. 4 is the first and perhaps most invidious example of how federal regulations intrude upon colleges' independent academic planning and decisionmaking processes. Since the Revised Order's initial application to colleges and universities, its critics have charged that the regulations tend to diminish independent professional judgment in matters of hiring and promotion of faculty (Shulman, 1972).

This charge is bolstered by anecdotal reports of white male academics who are turned down for faculty positions because they did not meet the goals of the institution's affirmative action plan; the assumption in these reports is always that the female or minority scholar hired instead was less qualified for the position. Such treatment of qualified applicants is not permissible under Revised Order No. 4.

But reports of occasional abuse do not constitute evidence that Revised Order No. 4 has harmed independent academic judgment overall. In fact, the academic community has not produced hard evidence that such deterioration has occurred. As it happens, there are indications that the academic community has learned to adapt to the affirmative action regulations and to develop procedures that make the hiring process more equitable and that open it up to qualified candidates who might not have been considered previously ("Making Affirmative Action . . .," 1975).

On the negative side, there is no doubt that affirmative action requirements present institutions with ongoing and often burdensome bureaucratic procedures to document institutional compliance. Sometimes these procedures are mandated by the regulations, but they are also developed by institutions themselves to make the regulations applicable to their situations, or to provide cautious institutions with a means of assuring that they can document compliance efforts. These internal procedures require considerable amounts of faculty and staff time. At the University of California at Berkeley, for example, every faculty appointment is subject to a detailed administrative review (Bowker, 1977). Such detailed procedures may delay a decision on hiring or promotion for some time, and they may in fact be counter-productive in some instances. For example, Bowker reports that one faculty position was not filled by the desired female candidate because affirmative action procedural requirements meant a three-month delay on a final decision, and the candidate had taken a position at another campus in the interval between the initial decision to hire her and final approval by the university.

Executive Order 11246, as amended, may also affect institutional conditions because it may be costly to administer an affirmative action plan and because an institution may have to compensate faculty for past discrimination in salary and rank. But information on the costs involved is difficult to obtain for several reasons. First, Revised Order No. 4 costs are classified with affirmative action costs involved in other federal programs, such as the Equal Pay Act of 1963, since such programs are often administered from the same office. Second, it is difficult to divide the costs involved in an affirmative action program between what is absolutely mandated by the regulations and what other actions the institution may take to protect its compliance status because it is unclear about all actions that may be required. Third, it is difficult to compare costs nationally because institutions are in different stages of compliance when they begin their affirmative action programs, so inital costs are different. And fourth, compared to other federally-mandated obligations, affirmative action costs may be more or less important in the total institutional budget.

This last point develops from the results of a study of federally-mandated social programs conducted in 1976. Van Alstyne and Coldren (1976) examined the cost impacts of twelve federally mandated social programs on four private and two public higher education institutions from 1965 to 1975. Affirmative action costs were lumped together in one figure with other equal opportunity (EEO) costs. As a percentage of total costs of federally-mandated social programs, EEO costs were significantly higher at some colleges than others for the 1974-75 academic year. These percentages depended in large part on whether the institution participated in the Social Security system. For example, EEO costs at a public state university, which does not have Social Security, were 64 percent of the total costs of federally mandated social programs; but EEO costs at a private university with a hospital made up only 2 percent of the total costs, while Social Security accounted for 70 percent of the costs.

*Title IX.* The self-evaluation required under Title IX compels colleges and universities to reexamine policies and practices that may be at the heart of an institution's academic life. The regulations require the institution to alter any practices that have a discriminatory impact on either sex. Thus, Title IX has the potential to make major changes in academic life. But critics of federal regulation under Title IX have focused on one major issue: athletics. On this issue, Title IX may challenge an institution's or a department's beliefs about the place of athletic programs. It is widely recognized that men's and women's athletic programs frequently have had different origins and therefore differ in their goals and structure. Many men's intercollegiate programs developed separately from their college physical education programs, and have concentrated on national or regional competitions and spectator sports. In contrast, women's athletic programs generally have been more closely linked to physical education programs and emphasize "instruction, student participation and lifetime sports" (Dunkle, 1976, p. 136). In establishing equity for separate sports programs, or in merging programs, administrators are concerned that the philosophy of one program, generally the women's, will be lost.

A large part of the problem results from the greater expenses already entailed in supporting men's revenue-producing sports. Revised regulations on how to make allocations between women's and men's sports equitable have been a source of great controversy. Final regulations are expected in Spring 1979.

*Section 504.* It is too early in the history of Section 504 to know in what ways it may influence academic life. As in Title IX, however, the self-evaluation required by Section 504 regulations calls for careful consideration of how institutional policies and practices may wrongfully discriminate against qualified handicapped individuals. Under Section 504, for example, handicapped students may not be barred from participating in an academic program because of requirements that are irrelevant to their ability to learn: e.g., "prohibition of tape recorders or braillers in classrooms or dog guides in campus buildings." (Biehl, 1978, p. 39). Moreover, colleges cannot avoid changes on their campuses by making special arrangements, such as consortia, addressed to handicapped students only.

But Section 504's greatest potential for influencing campus life lies in its requirements for providing handicapped individuals with "accessibility" to all institutional education programs and activities. College administrators have generally interpreted this requirement to mean that they must provide complete structural accessibility. They have therefore been particularly concerned about the cost of providing accessibility to handicapped students in buildings built before 1968.[5] However, Section 504 does not require institutions to provide a barrier-free environment for handicapped individuals. *"Structural changes are required only where there is no other feasible way to make a program or activity accessible."* (Emphasis in original) (Biehl, 1978, p. 21)

### The College as Employer

The higher education community has become more sensitive to its financial obligations as an employer because of legislation passed during the 1970's. New laws or changes in old ones have escalated the cost of meeting federally-mandated business obligations to an alarming degree. Because of their distinctive financial structure and their employment policies and practices, higher education institutions cannot absorb these costs using the methods available to traditional profit-making enterprises. The drain on income that has resulted inevitably means that higher education institutions are constrained in their efforts to spend money on academic concerns.

Therefore, the federal policy of treating universities as traditional employers now merits most serious attention at all levels of academic administration. Furthermore, this policy contributes to a problem the higher education community believes it has in its relationship with the federal bureaucracy, i.e., that the federal government is often insensitive to the unique characteristics of the academic community, and consequently its employment requirements affect it more than the traditional business sector.

In this connection, they urge that colleges and universities not be looked on as just one more sector of the nation's economy. Higher education institutions, as nonprofit organizations, are unwilling and unable to pass on to their "customers" the full cost needed to meet their expenses. Such a step would price most students out of the educational market, and ultimately create a decline in revenue.

Consequently, higher education finds itself in a triple bind: as employers, colleges must meet escalating federal business costs; as nonprofit organizations, they are hard-pressed to raise the necessary funds to pay those costs; and as educational institutions, they are finding that inordinate amounts of funds, time, and employee activity are given over to meeting federal requirements that are irrelevant to their central educational mission.

Of all the federal employment-related laws affecting higher education, three have received particular attention in recent years. These pose some of the most serious long-range financial and policy implications for higher education. They are the Social Security Act of 1935, as amended, the Employee Retirement Income Security Act (ERISA) of 1974, and the Age Discrimination in Employment Act of 1976, as amended.

### Social Security, ERISA and ADEA

As employers, colleges and universities differ from traditional businesses because they are nonprofit enterprises. Furthermore, in many cases, public higher education institutions are classified as agencies of the state, a distinction not shared by most employers. These characteristics make higher education institutions theoretically exempt from one or more of the three personnel management laws discussed here. However, colleges and universities provide their staff with employee benefits similar in kind to those offered in the profit sector of the economy, and therefore they have to abide by the regulations applicable to that sector.

For example, participation in the Social Security system is optional for all nonprofit organization, but most institutions cannot afford a private pension system that could provide benefits to employees equivalent to those gained from Social Security (Magarrell, 1978). Therefore, the large majority of colleges and universities do participate: virtually all private colleges belong to the system, and about two-thirds of all public employees of state and local governments have Social Security coverage (King, 1978). Dissatisfied institutions do have the option of dropping their coverage, but once they take such a step, they cannot participate again. Their employees would lose coverage after five years and would have to wait five years before getting Social Security coverage with a new employer (Magarrell, 1978).

In addition to Social Security coverage, virtually all colleges and universities offer employee benefit plans. Since 1974, the Employment Retirement Income Security Act has regulated the operation of employee benefit plans in the private sector. ERISA does not regulate public employers, even though they may use a private plan. Therefore, public institutions, as agencies of state or local governments, are exempt from ERISA. For higher education, this dichotomy between the public and private sectors means that the approximately 90 percent of all independent institutions using TIAA-CREF, a private benefit plan, are covered by ERISA, but the one-third of all public institutions using this same plan are exempt from coverage (King, 1978).

Under the ADEA, however, public and private institutions are equally affected. As amended in 1978, ADEA raises the mandatory retirement age for most employees in the private and public sectors from sixty-five to seventy years, effective January 1, 1979. But in higher education institutions tenured faculty members will have to retire at the current mandatory age limit on their campus until July 1, 1982, when they will also become protected by this law.

### Problems Under Social Security, ERISA and ADEA

Colleges and universities do not know the long-run economic and qualitative impacts of the recent cost escalations in meeting Social Security, ERISA, and ADEA requirements. Each of these laws presents its special problems. Colleges fear they will be more hard pressed than ordinary business enterprises to meet their expenses "[to] the extent that [they] are more labor intensive" (Van Alstyne and Coldren, 1976, p. 19). Van Alstyne and Coldren observe that the costs of most federal personnel programs are calculated on a per-employee basis. Therefore, institutions that "maintain low student-faculty ratios, or carry out research or have hospitals or extensive physical facilities, residences and grounds . . . will necessarily incur large costs for employee-related programs" (p. 16).

Of the three laws under consideration, Social Security accounts for the largest part of institutional budgets going to federally mandated social programs. Van

Alstyne and Coldren report that Social Security's share of such costs for 1974-75 ranged from a low of 48 percent at a private university with a hospital and an enrollment of 10,000 to a high of 70 percent at a private university with a hospital and an enrollment of 8,000. For all six institutions they studied, Social Security costs were slightly more than $5 million in 1974-75.

Another study of Social Security costs (Minter and Fadil, 1978) projects the cost increases that private institutions will have to bear from 1979 to 1987 under the new Social Security taxes effective January 1, 1979. This survey reports on 77 independent colleges and universities considered representative of the 901 institutions in Carnegie Classification categories 1, 2, and 3, excluding two-year colleges and specialized institutions. Of these 77 institutions, the average institution's increase in administrative faculty and staff salary costs during 1979-87 will be $440,755 more under the new law. For all 901 institutions, Minter and Fadil calculate that aggregate employer Social Security costs will increase by $397,120,000 for the eight-year period.

The higher education community regards Social Security taxation as a particularly heavy burden because of the magnitude of this cost escalation, and the fact that the most dramatic tax increases are for salaries in the $20,000 to $30,000 range (Policy Analysis Service, 1978). Therefore, college and university officers are especially interested in reforming the Social Security system by holding down taxes on employers and employees, and using general revenue financing to fund Social Security benefits. Colleges and universities would gain from such a change because as nonprofit organizations they do not contribute to the general revenue fund (Policy Analysis Service, 1978). Currently, as one researcher notes, "it is ironic that institutions exempt from taxes on income, property, and sales do pay the [payroll] taxes that provide the 'fastest growing source of Federal revenue'" (Scott, 1978, p.37).

Some college administrators have expressed interest in dropping out of the Social Security system altogether because of its increasing cost over the next ten years (Magarrell, 1978), but several factors make it unlikely that such a step will be taken (Finn, 1978). Finn explains that since Social Security benefits are tax-free, it would be very costly for colleges to provide a plan offering equivalent after-tax benefits. Moreover, Social Security presently has an open-ended cost-of-living escalator that is not usually found in private plans; and even when such a private plan option is available, it is very costly to employers and is usually limited to annual increases of four percent.

*ERISA*. The Employee Retirement Income Security Act of 1974 (ERISA) has complicated the administration of employee benefit plans in higher education. ERISA is intended to guarantee employee plan solvency and to insure that employees understand any benefits (retirement, illness, disability, death, unemployment, vacation, and training) to which they are entitled (Heller, 1975). Compliance with this legislation requires administrators to master numerous reporting requirements of the Department of Labor and the Internal Revenue Service, as well as to distribute annual and other reports to all employees covered by benefit plans (Heller, 1975).[6]

In addition to these reporting requirements, personnel offices must adapt ERISA eligibility regulations to the unique characteristics of faculty employment structures. For example, ERISA requires that employees be credited with a full year's work for retirement plan eligibility purposes when they complete 1,000 hours of service within a twelve-month period. For colleges, the difficulty lies in defining "hours-of-service" for faculty members whose schedules are not measured by normal industrial standards. The Department of Labor has developed several alternative methods for calculating a year of service for such a typical employee. Of these methods, TIAA-CREF (1977a) recommends one based on "elapsed time," a method that is "most appropriate where the institution wishes to extend eligibility to all staff members in an eligible class whether part-time or full-time" (TIAA-CREF, 1977a, p. 11). Under this method:

> . . . an employee is credited with a period of service that is equivalent to a year of service on each anniversary of his or her employment date. There are no minimum hours or teaching load requirements and hourly records need not to kept . . . This method substitutes the concept of an elapsed period of service for a year of service and equates the two on the basis of a twelve-month period (TIAA-CREF, 1977a, p. 11).

Colleges and universities may also find that ERISA hampers their ability to provide employees with certain financial advantages. In testimony before a House of Representatives' committee studying pension policies, TIAA-CREF chairman William Greenough reported that ERISA limits the amount employers can set aside for their employees on a tax-deferred basis. This limit comes on top of one imposed by the IRS and, consequently,

> . . .colleges and universities were handicapped in their efforts to provide supplemental income for persons who wished to retire early, or to augment inadequate prospective benefits (TIAA-CREF Chairman 1978).

*Mandatory Retirement.* Since the passage of the 1978 Amendments to the Age Discrimination in Employment Act of 1967, college officials have been concerned that the new mandatory age limit of 70 will create additional financial burdens for their institutions because they will have to employ high-salaried faculty over a longer period of time. Moreover, they have been uncertain about this law's implications for long-range institutional planning and development.

These concerns, however, have largely been based on a vacuum of knowledge on long-term retirement trends and faculty profiles. Colleges have until 1982 to develop a data base for their needs and to observe the impact of this legislation on other sectors of the economy before they are subject to its requirements.

Current retirement trends are difficult to interpret. Some recent analyses indicate that retirement before the mandatory age is occurring at an increasing rate. TIAA-CREF records indicate that early retirement is an increasing long-term trend: in 1966, 16 percent of participants in the plan who began benefit payments were below age 65; in 1976 this figure had changed to one-third of all participants (McCormack, 1978). A study of the University of California faculty during 1968-1975, when the mandatory retirement age was 67, revealed that 40 percent of full-time male and 72 percent of full-time female faculty retired before age 67. At the State University of New York, whose mandatory retirement age is 70, more than two-thirds of the faculty retiring between 1973 and 1977 were age 65 (McCormack, 1978).

While these trends suggest that the new law may only minimally affect faculty retirement, recent opinion polls indicate an opposite conclusion. A 1977 Harris opinion poll found that a margin of 86 percent to 12 percent of those surveyed agreed that "nobody should be forced to retire because of age, if he or she wants to continue working and is still able to do a good job;" a similar poll in 1974 had found that a ratio of 45 percent believed it was a "good thing that the age at which people are required to retire has become younger in recent years" ("'No' Vote . . .," 1977).

A survey of faculty opinion on early retirement found faculty members interested in continuing to work past age 65, particularly if the mandatory age limit were increased. In fact, mandatory age limits themselves appear to affect retirement decisions: at institutions where the retirement age is 65, 10 percent of the faculty would choose to work beyond age 67, while 29 percent would choose to work past 67 at colleges that have an age 70 limit (Ladd and Lipset, 1977). Another factor is that no one can predict what impact continuing inflation will have on retirement decisions that may be delayed in order to garner more earnings and higher pension benefits (Heim, 1978).

Qualitatively, there is a concern that institutions will not be able to meet their long-run needs in current and new disciplines because an oversupply of tenured faculty in some fields will limit flexibility in staffing. Heim (1978) explains:

> . . . the problem is more than one of total turnover, but also [of] the segments involved. The imbalance between the staff it has and the staff it needs tends to increase with the length of time on the staff (Heim, 1978, p. 7).

The Age Discrimination in Employment Act may also affect hiring decisions when a faculty slot does become available. Here, institutions need to establish that a decision was based on "the persuasiveness of reasonable factors other than age . . . or of age as a *bona fide* occupational qualification for the job" (Haslam, 1975, p. 331).

The potential problems presented by the new retirement legislation indicate a need to examine methods of reliable prediction and planning for college faculty retirements. So-called "early retirement plans" may meet this need. Such plans are designed to encourage employees to retire early by offering financial compensation for foregone salary and/or Social Security and pension benefits. For colleges and universities, early retirements may alleviate the twin burdens of longer salary outlays at the higher end of the pay scale and constraints on long-range planning, which administrators fear may result from the new mandatory retirement legislation.

When considering an early retirement plan, administrators need to weigh the total cost of the plan against the benefits the institution expects to gain. In so doing, they are likely to conclude that an early retirement plan that is financially appealing to employees is not economical for the institution. But an institution may nevertheless find such a plan attractive because it offers flexibility in program planning by influencing employee retirement patterns in areas where changes are needed.

Jenny (1974) suggests that a "zero-cost solution," in which the employee is not replaced, is given severance pay, and is not compensated for any lost retirement income, is only likely to occur in cases of dismissal or extreme financial exigency. Instead, colleges will have to examine options that result in added cost. These options may include one or more of the following approaches, listed in order of increasing cost to the employer: (1) lump-sum payment of the employer's pension contribution; (2) continuing payment of the pension contribution to retirement age; and (3) restoration of lost Social Security benefits. The employer also must add the cost of a faculty replacement, if needed, which may effectively eliminate any savings at all under an early retirement plan. An early retirement plan may thus provide no real savings.

But early retirement plans are appealing as a method of enhancing institutional quality and flexibility by encouraging more rapid faculty turnover and replacement. Pattern, Kell, and Zelan (1977) believe that this advantage may be important.

> ... early retirement ... can have a significant *qualitative* impact in selected institutions and departments, by permitting a small number of significant new appointments, by facilitating the departure of a few individuals who desire to leave, and by creating a climate in which career options are broadened (p. iv) (emphasis in original).

**Cumulative Problems With Federal Regulations**

Within the past ten years, higher education's problem in three regulatory issues have deepened. These issues are not the direct product of any particular regulation, but rather are the cumulatory result of experience with the regulatory process. The subjects discussed include: administrative costs and changes resulting from regulatory requirements; the academic community's perception of heightened adversarial climate on campus; and recommendations to improve the regulatory process so that it better serves the needs of the academic community. The kinds of regulations discussed earlier–civil rights and employment-related obligations–are major contributors to the growth of the "umbrella" issues discussed here.

*Administrative Costs and Changes.* The effect of federal regulations on campus is most visible in the growth of administrative staff to meet federal reporting, documentation, and compliance monitoring requirements.[7] This growth has been an important item in college and university budgets:

> Between 1929 and the mid-1960's, expenditures for administration increased 21 times ... from the mid-60's to the early 1970's, current fund expenditures by colleges and universities for administration increased by more than 30%, while expenditures for instruction increased by only 10% ... and this was during a period when enrollments nearly doubled. . .(Scott, 1978, p. 1).

While these "overhead" costs are significant, it may be extremely difficult to calculate them with precision. Complex methodology would need to be developed to break down the costs of multipurpose activities into their separate, federally-mandated parts.

Nevertheless, some effort has been made in this direction. In an innovative study, Van Alstyne and Coldren (1976) discuss the costs associated with twelve federally-mandated programs[8] at six institutions: the College of Wooster, Duke University, Georgetown University, Hampton Institute, Miami-Dade Community College, and the University of Illinois at Urbana. Their study required the participating institutions to develop jointly a conceptual survey instrument, and to report all pertinent institutional data from 1965-1975.

In addition to substantial financial outlays for the federally-mandated programs themselves, these six institutions faced rapidly increasing administrative costs. Over the ten-year period, these costs increased from "a negligible share to as much as one-eighth to one-quarter of the general administrative costs of these institutions" (Van Alstyne and Coldren, 1976, p. 15).

The higher education community finds that the administrative problems posed by federal regulations do not lie solely in escalating costs. Of equal importance, many point out, is a change in administrative structure that is under way on college and university campuses. Inexorably, as the need to respond efficiently to the federal government grows, college administration systems are becoming more centralized.

The general view appears to be that more centralized and costly administrative activities are detrimental to colleges' efforts to achieve the very goals for which legislation has been designed. This opinion is evident in a report from one University of Iowa administrator responsible for implementing the Buckley amendment (The Family Educational Rights and Privacy Act of 1974, as amended, guaranteeing students' privacy for and access to their academic records) who complained that the regulations had decreased the amount of time he could spend on his primary function: placing students in jobs (Spriestersbach, 1977).

The higher education community has almost universally attributed its administrative burdens to excessive federal requirements. One researcher, however, has recently suggested that a college community can aggravate its administrative problems because of its "institutional style," i.e., the manner in which an institution "conducts its affairs" (Scott, 1978, p. 20). Scott reviews equal employment opportunity compliance at comparably situated colleges to illustrate how leadership style influences program effectiveness. He reports that the least effective program has the most bureaucratic structure. One program includes a variety of means to deal with equal employment opportunity. Inevitably, this diffuse organization results in such activities as multiple requests for data, complicated forms to be completed, and lengthy reports. At this school "Affirmative Action is the object of scorn by department chairmen . . . because the administration of the program is seen as inept" (p. 22).

In contrast, Scott reports favorably on the program at another institution where the equal employment officer is "a woman in her early thirties who had a successful career teaching English on the campus" before her current position (p. 23). She closely monitors campus compliance with the university's affirmative action plan and is favorably regarded by faculty and administrators. Scott finds that "the absence of long and involved forms, together with her visibility and desire to help . . . have helped make this environment progressive and nonbureaucratic" (p. 23).

### Adversarial Relations

Higher education leaders have often charged that federal investigators on campus have promoted an adversarial relationship between the institution and the government, so that common purposes are not properly advanced. This criticism is frequently the kind of rhetoric faulted by Saunders as unconstructive and negatively influential in higher education's federal relationships (Saunders, 1977, p. 45). Nonetheless, this complaint merits attention because it is so widespread and because hostile attitudes make more difficult the job of achieving compliance through cooperative efforts.

A major cause of hostility is higher education's perception that at times federal representatives appear to consider colleges and universities as merely one more part of the nation's industrial sector. Education officials believe that colleges' social contributions differentiate their activities from traditional business enterprises, but that this distinction is largely ignored when regulations are written and enforced. They also point out that business regulations do not mesh successfully with the rules and forms of behavior that have evolved in the higher education community.

Some observers also suggest that the adversarial relationship between higher education and the federal government has been exacerbated because both sides tend to employ lawyers to represent their interests. Bowker (1977) finds that lawyers often conflict with campus administrators and faculty when a problem must be resolved because they want to see all aspects of a decision incorporated into a formal agreement. In contrast, administrators who "are paragons of order, formality, and attention to detail in comparison with the faculty," believe that successful problem-solving frequently requires "informal agreements," and a willingness to leave certain issues unstated or certain details ignored (Bowker, 1977, p. 405). Faculty and administrators therefore find lawyers' predilection for written agreements a source of tension.

## Reforming the Regulatory Process

The regulatory process, from its initial actions to the final product, leaves many higher education observers dissatisfied with how regulations affecting its interests are developed. In an effort to make this process more responsive to circumstances at colleges and universities, higher education advocates have recommended that it be reformed to produce more realistic, enforceable regulations.

Recommendations for reform developed by Fadil and Coddington (1977) are designed to deal comprehensively with the range of problems the higher education community has with the regulatory process. Their guidelines would have every proposed regulatory bill include:

> 1. . . .a clear statement of intended outcomes and a requirement that the effectiveness of subsequent regulations for achieving these outcomes be reported annually to Congress by the responsible regulatory agency;
>
> 2. . . .a fiscal note estimating as accurately as possible total direct, indirect, and opportunity costs of the proposed legislation. . .[and] an estimate of the differential impact of all three types of costs on identifiable classes of "regulatees". . .;
>
> 3. . . .as part of its statement of anticipated effect, [a description of] where its foreseen rules might conflict or overlap with existing rules. . .;
>
> 4. . . .a "sunset" provision. . .[terminating] any such act on a given date. . .unless, a counteracting measure to extend the act [is enacted];
>
> 5. . . .[a clear statement] that penalties for non-compliance are intended to be limited insofar as possible to the domain of the purposes of legislation. . .;

> 6. [a requirement] that the responsible agency hold open advance consultation with the "regulatees" prior to drafting regulations. . .;
>
> 7. [an effort to see that] regulations, especially centralized and broadly pervasive regulations are reduced towards a vanishing minimum. . ." (pp. 5-6).

Such guidelines would attempt to clarify congressional goals for any particular legislation, so that regulatory requirements are tailored to those goals and do not go beyond congressional intentions. The fiscal note would require Congress to consider carefully the cost problems associated with compliance, and perhaps offer financial assistance to certain affected groups. A more open method of consultation before regulations are written would afford higher education interests an opportunity to obtain more realistic and effective regulations for achieving compliance.

This is a propitious period for influencing the regulatory process. Executive Order 12044 (1978) indicates the executive branch's interest in reforming the regulatory process. The Order has as a major objective that regulations be clear and effective and not impose unnecessary burdens on those they affect. The Executive Order also encompasses other recommendations that could well serve higher education interest groups. For example, it requires that a regulatory agency: (1) take active steps to consult with affected interest groups before regulations are written; and (2) "make an estimate of the new reporting burdens or recordkeeping requirements necessary for compliance with the regulation" before significant regulations "are approved as publishable for comment" (p. 12662).

## Conclusions

The higher education community's current conflicts with federal agencies originated during the 1960's, when colleges and universities were caught up in the national movement to provide equal opportunities to all groups in society. Higher education was considered an important vehicle in the effort to achieve social justice because it could provide skills necessary to upward social and economic mobility. In the federal view, it was therefore appropriate to support higher education to achieve social objectives.

In the past fifteen years, the federal government has also worked to win equity for employees in the workplace by revising existing laws or enacting new ones that monitor employer-employee relations. As major employers, colleges are therefor subject to most laws affecting traditional business enterprises. But they contend that these regulations affect them more adversely because they have distinctive financial and employment structures that make it extremely difficult to adjust to the financial burden imposed by these laws.

Recognizing the influence of both civil rights regulations and employment laws upon its activities, the higher education community is beginning to identify specific problems it has in its federal relations. This process calls for a realistic appraisal of what is occurring on college campuses. The academic community should include in this appraisal an assessment of whether college and university problems are different from those experienced by other enterprises, and, if they are, whether colleges should consequently be treated differently from other entities by the federal government.

With respect to civil rights laws and regulations tied to educational programs and activities, administrator and faculty fears that these regulations would undermine professional judgments have not been realized, although the potential for abuse does exist. But three major problems have emerged. First, there is sufficient evidence to suggest that the burden of bureaucratic procedures resulting from regulations may in itself be harmful because it creates an antagonistic atmosphere in which attention is directed away from academic concerns to focus on procedural issues. Major responsibility for cumbersome bureaucratic procedures rests with the federal government, but as Scott points out, institutions also contribute to these difficulties. The higher education community could assist itself by streamlining its internal processes.

Second, and equally important, the compliance process for federal civil rights enforcement has proven to be a major source of friction between federal agencies, institutions, and special interest groups. There are no clear resolutions to the problems that have developed: (1) HEW has failed to promptly and clearly state its criteria for evaluating compliance, so that both institutions and interest groups must frequently operate with limited knowledge of what is required; (2) HEW has also been faulted for being insensitive to academic processes, thereby making it difficult to develop a cooperative effort between institutions and government; (3) protracted negotiation between HEW and an institution over its compliance status constitutes an interim penalty process, since is costly to the institution, but protected groups charge that the delays involved in a final decision forestall equitable treatment.

Finally, compliance with civil rights regulations has serious financial implications for colleges and universities. For the most part, they must simply bear the costs of compliance, which include both administrative costs and compensation payments. But the academic community believes that in at least some instances, such as structural changes for Section 504, they deserve some assistance from the federal government.

Overall, regulatory problems have resulted in large part because higher education holds as fundamental principles certain concepts that are often in conflict with regulatory practices. The list that follows summarizes these concepts as they appear in discussions among higher education officials and throughout the literature on federal regulatory problems:

- Federal legislators and agencies do not sufficiently recognize these differences in the conduct of their relationships with the higher education community.
- Current federal regulations intended to achieve social objectives are inefficient and liable to be unsuccessful because they are not based on an understanding of how a campus community functions.
- With respect to employment-related laws, a college's nonprofit status does not save it from costly personnel expenses. These expenses increase colleges' difficulties in meeting their educational obligations.

Clearly higher education interests believe they merit special treatment, and perhaps they do. Pleas for special treatment, however, do not constitute a coordinated, planned effort to influence policymaking. There still remains the major task of using effective lobbying techniques that can speak for the sometimes conflicting interest groups that constitute the academic community.

# BIBLIOGRAPHY

Age Discrimination in Employment Act Amendments of 1978. P.L. 95-256 § 29 U.S.C. § 631.

Batten, Michael D. "The Age Discrimination in Employment Act of 1967." In *Federal Regulations and the Employment Practices of Colleges and Universities.* A Guide to the Interpretation of Federal Regulations Affecting Personnel Administration on Campus. Washington, D.C.: National Association of College and University Business Officers, August 28, 1975.

Bender, Louis W. *Federal Regulation and Higher Education.* ERIC Research Report No. 1. Washington: American Association for Higher Education, 1977. ED 135 323. MF-$0.98; HC-$5.17.

Biehl, G. Richard. *Guide to the Section 504 Self-Evaluation for Colleges and Universities.* Washington: National Association of College and University Business Officers, 1978. ED 152 208. MF-$0.98; HC-$8.01.

Bok, Derek C. *Harvard University. The President's Report 1974-1975.* Cambridge: Harvard University, January 19, 1975.

Bowker, Albert H. *The Impact of Federal Regulations on the University of California. An Institutional Self-Study for the Sloan Commission on Government and Higher Education.* Berkeley: University of California, September 19, 1977.

Califano, Joseph A., Jr. "Statement of Secretary Joseph A. Califano, Jr. Department of Health, Education, and Welfare." March 22, 1978a.

________________. "Statement by Secretary Joseph A. Califano, Jr. Department of Health, Education, and Welfare." May 12, 1978b.

________________. "Statement of Joseph A. Califano, Jr., Secretary of Health, Education, and Welfare," June, 1978c.

Coldren, Sharon. Conversation with author, March 15, 1978.

________________, and Knepper, Paula. "Social Security Taxation Project: Supporting Data." Economics and Finance Unit, American Council on Higher Education and Exxon Education Foundation, February 1978.

"Colleges Must Have Acceptable Affirmative Action Plans, OFCCP Official Says," *Higher Education Daily,* May 11, 1978, p. 3.

Commission on Colleges. Southern Association of Colleges and Schools. *Colleges and Universities Speak out on Cost of Federal Compliance in Higher Education.* A Special Report. Atlanta: December 1976. ED 134 083. MF-$0.98; HC-$2.03.

"Compendium of Federal Authorities Applicable to Colleges and Universities with Divisional Cross References." Sloan Commission on Government and Higher Education. [Cambridge, Mass.]: April 1977.

Conrad, Clifton and Cosand, Joseph. *The Implications of Federal Education Policy.* ERIC Research Report No. 1. Washington: American Association for Higher Education, 1976. ED 124 066. MF-$0.98; HC-$3.86.

Corwin, Thomas M. "A Research Perspective on Mandatory Retirement," in *Changing Retirement Policies. Current Issues in Higher Education* edited by Liza Mickle. Washington, D.C.: American Association for Higher Education, 1978.

Coughlin, Ellen K. "Campuses Face Boost in Social Security Taxes," *The Chronicle of Higher Education,* January 16, 1978a, p. 16.

————————."Colleges Could Retire Tenured Teachers at 65 – Until 1982," *The Chronicle of Higher Education,* March 13, 1978b, p. 1.

Dunkle, Margaret. *Competitive Athletics: In Search of Equal Opportunity.* A Manual on intercollegiate athletics for athletic directors, administrators, coaches and others concerned with providing equal athletic opportunity in colleges and universities. Washington, D.C.: Resource Center on Sex Roles in Education, National Foundation for the Improvement of Education, Fall 1976. ED 135 789 MF-$0.98; HC-$12.21.

Education Amendments of 1972, 20 U.S.C. § 1681. P.L. 93-406.

Engstrand, Gary (Assistant to the Vice President for Administration and Planning, University of Minnesota) to author, May 31, 1978.

"Equal Employment Opportunity. Final Rulemaking," *Federal Register* 42 (January 18, 1977): 3453.

Executive Order 12044. "Improving Government Regulations," *Federal Register* 43 (March 24, 1978): 12661-12270.

Executive Order 11246. *Nondiscrimination Under Federal Contracts.* Washington: U.S. Department of Health, Education, and Welfare, Office for Civil Rights, September 24, 1965, as amended by Executive Order 11375, October 13, 1967.

Fadil, Virginia, and Coddington, Parker. "Implementing Federally-Mandated Programs: Issues and Recommendations." An Occasional Issue Paper. Washington: National Association of Independent Colleges and Universities, 1977.

Fields, Cheryl M. "29 Universities Warned U.S. May Withhold Contracts," *The Chronicle of Higher Education,* June 23, 1975a.

————————."Affirmative Action Reprieve," *The Chronicle of Higher Education,* 1975b, p. 5.

————————."U.S. Holds Up $1.5 Million Contract for Berkeley Lab; Layoffs Threatened," *The Chronicle of Higher Education,* May 1, 1978a, p. 4.

————————."U.S. Approves Release of Contracts at Berkeley," *The Chronicle of Higher Education,* May 8, 1978b, p. 8.

"Format for the Development of an Affirmative Action Plan by Institutions of Higher Education." *Federal Register* 40 (August 25, 1975): 37064.

*The George Washington University.* A Report to the Middle States Association of Colleges and Schools, Commission on Higher Education. Washington: GWU, December 1976.

Gerry, Martin H. "Memorandum to College and University Presidents," August 1975.

Gladieux, Lawrence E. and Wolanin, Thomas R. *Congress and the Colleges.* Lexington, Mass.: D.C. Heath, 1976.

Golladay, Mary A., and Noell, Jay (editors). *The Condition of Education 1978 Edition.* Washington, D.C.: Government Printing Office, 1978.

Grant, W. Vance and Lind, C. George. *Digest of Education Statistics* 1977-78. Washington, D.C.: National Center for Education Statistics, 1978.

Greenough, William C. (Chairman, Teachers Insurance and Annuity Association and College Retirement Equities Fund). Statement Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, June 23, 1972, On Proposed Pension Legislation, the "Retirement Income Security for Employees Act of 1972." (S. 3598).

_______________. Testimony before the House Subcommittee on Retirement Income and Employment, March 13, 1978.

Haslam, C.L. "Age Discrimination in Campus Employment," *The Journal of College and University Law* 2 (Summer 1975): 326-341.

Heim, Peggy. "Implications of Mandatory Retirement Legislation for Higher Education Institutions," in *Changing Retirement Policies. Current Issues in Higher Education* edited by Liza Mickle. Washington, D.C.: American Association for Higher Education, 1978.

Heller, William F. "Higher Education and the Pension Reform Law (ERISA)" in *Federal Regulations and the Employment Practices of Colleges and Universities.* A Guide to the Interpretation of Federal Regulations Affecting Personnel Administration on Campus. Washington: National Association of College and University Business Officers, August 28, 1975.

Hemmings, Madeline B. Conversation with author, March 2, 1978.

*Higher Education Guidelines. Executive Order 11246.* Washington, D.C.: Department of Health, Education, and Welfare, Office of the Secretary, Office for Civil Rights, October 1, 1972, ED 074 893. MF-$0.98; HC-$6.51.

Hornig, Donald. "The Costs of Government Regulation," Draft presented at the Fourth General Conference on the Idea of a Contemporary University, University Centers for Rational Alternatives. Washington: December 10-11, 1976.

Jenny, Hans H. *Early Retirement. A New Issue in Higher Education: The Financial Consequences of Early Retirement.* New York: Teachers Insurance and Annuity Association of America, 1974. ED 095 759. MF-$0.98; HC-$3.68.

Karlesky, Joseph H. *Federal Regulations at Franklin and Marshall College.* Study for the Sloan Commission on Government and Higher Education.

Lancaster, Pennsylvania: Franklin and Marshall College, October 1977.

King, Frank (Head, TIAA-CREF, Education Research Department), Conversation with author, May 10, 1978.

Kershaw, Joseph A. *The Federal Government and Williams College.* A Report to the Sloan Commission on Government and Higher Education. Williamstown, Mass.: September 1977.

Ladd, Everett Carll, Jr. and Lipset, Seymour Martin. "Many Professors Would Postpone Reitrement If Law Were Changed," *The Chronicle of Higher Education,* November 7, 1977, p. 7.

Magarrell, Jack. "College Given a Warning on Dropping Social Security." *The Chronicle of Higher Education. February 27, 1978, p. 38.*

*Making Affirmative Action Work in Higher Education. An Analysis of Institutional and Federal Policies with Recommendations.* A Report of the Carnegie Council on Policy Studies in Higher Education. San Francisco: Jossey-Bass, 1975.

McCormack, John J., Jr. "Mandatory Retirement Age," Speech presented at the CUPA National Seminar, San Diego and Forth Worth, February 20-24, 1978.

McGill, William J. "Government Regulations and Academic Freedom." Speech presented at the University Centers for Rational Alternatives. December 11, 1976. The Fourth General Conference on the Idea of a Contemporary University, University Centers for Rational Alternatives, Washington, D.C.: December 11, 1976.

Minter, W. John and Fadil, Virginia. *The Projected Impact of the New Social Security Taxes Upon Employer Contributions at Independent Colleges and Universities – 1979 to 1987.* Washington, D.C.: National Association of Independent Colleges and Universities, January 1978. ED 149 704. MF–$0.98; HC–$2.03.

Mulanaphy, James M. *Retirement Preparation in Higher Education.* A study of counseling and information programs. New York: Teachers Insurance and Annuity Association College Retirement Equities Fund, 1978. ED 150 911. MF-$0.98; HC-$6.51.

National Association of College and Business Officers. "History off NACUBO Cost Estimate." [Washington], September 1977.

National Association of Independent Colleges and Universities. "The Impact of the Federal Regulatory Process Upon the Fiscal Condition of Independent Colleges and Universities." Grant Proposal (n.d.).

"Non-Discrimination on the Basis of Handicap in Programs and Activities Receiving or Benefitting from Federal Financial Assistance," *Federal Register* 42 (May 4, 1977): 22677.

"Nondiscrimination in Federally Assisted Programs. Annual Operating Plan for Fiscal Year 1978." *Federal Register* 43 (February 19, 1978): 7048.

"Nondiscrimination on the Basis of Sex," *Federal Register* (June 4, 1975), pp. 24128-24144. 45 C.F.R. § 86.

Patton, Carl Vernon, Diane Kell, and Joseph Zelan. *A Survey of Institutional Practices and an Assessment of Possible Options Relating to Voluntary Mid- and Late-Career Changes and Early Retirement for University and College Faculty. Final Report.* Washington, D.C.: National Science Foundation, November 1977. ED 152 183. MF-$0.98; HC-$17.93.

Policy Analysis Service, American Council on Education. Seminar on Social Security Taxes, April 14, 1978.

*Recruitment, Admissions and Handicapped Students. A Guide for Compliance with Section 504 of the Rehabilitation Act of 1973.* Washington, D.C.: American Association of Collegiate Registrars and Admissions Officers and the American Council on Education. April 1978. HE 010 166 (RIE Nov. '78). MF-$0.98; HC-$3.98.

The Rehabilitation Act of 1973 29 U.S.C. § 794. [P.L. 93-112], as amended [P.L. 93-516].

"Report of The Interagency Task Force on Higher Education Burden Reduction," December 14, 1976, in *A Report of the Commission on Federal Paperwork Education.* Washington, D.C.: Government Printing Office, April 29, 1977.

"Reporting and Disclosure Requirements of the Employee Retirement Income Security Act," Special Supplement, *BNA Pension Reporter* number 161 (October 31, 1977).

Revised Order No. 4, *Federal Register* 36 (December 4, 1971): 23152.

Rosenzweig, Robert M.; Wilkes, Christopher; and Freedman, Nancy. *The Stanford University Medical Center and the Federal Government.* A Report for the Sloan Commission on Higher Education and Government. Palo Alto: Stanford University Medical Center, September 1977.

Saunders, Charles B., Jr. "Easing the Burden of Federal Regulation: The Next Move Is Ours," *Educational Record* 57 (Fall 1976): 217-224.

_______________. Memorandum to the U.S. House of Representatives, June 6, 1978.

Scott, Robert A. "More Than Greenbacks and Red Tape: Campus Effects and Federal Compliance Requirements." 1978. Draft Report. A final version by this title appears in *Change* 10 (April 1978): 16-23.

_______________. "Lord, Squires, and Yeomen: Collegiate Middle-Managers and Their Organizations," ERIC/AAHE Research Report No. 9. Washington, D.C.: American Association for Higher Education, HE 010 909 (June 1979 RIE).

Shulman, Carol Herrnstadt. *Affirmative Action: Women's Rights on Campus.*

ERIC/Higher Education Research Report No. 6. Washington, D.C.: American Association for Higher Education, 1972. ED 066 143. MF-$0.98; HC-$2.42.

________________. "Keeping Up With Title IX," ERIC/Higher Education *Research Currents*, January 1977. ED 132 910. MF-$0.98; HC-$2.03.

"Small Contractors May Be Affected by Change in Contract Compliance Rules," *NACUBO Business Officer*, January 1978, p. 7.

Spriestersback, D.C. and Farrell, William J. "Impact of Federal Regulation At a University." *Science* 198 (October 7, 1977), 27-30.

"TIAA-CREF Chairman Asks for Changes in ERISA," *Higher Education Daily*, March 14, 1978, p. 1.

Teachers Insurance and Annuity Association of America. College Retirement Equities Fund. *ERISA Bulletin #8.* "Minimum Standards for Employee Pension Plans." August 29, 1977b. Attachment #1. "Retirement Resolution and Summary Plan Description for Standard TIAA-CREF Retirement Plans." Attachment #2 "Supplement to the Retirement Resolution and Summary Plan Description for Standard forms for annual reporting."

*ERISA Bulletin #22* "Exemption from Title I of ERISA Made Available to Tax-Deferred Annuity Plans. December 23, 1977c.

Todorovich, Miro. "Would a Reorganized Federal Department of Education Mean Better Higher Education?" Paper presented at the Fourth Annual Conference on the Idea of A Contemporary University, Washington, D.C., December 10, 1976.

"The Yes–But Retirement Act," *The New York Times*, October 21, 1977, p. A-30.

"Twenty-six Campuses and the Federal Government," *Educational Record* 44 (April 1963): 95-136.

University of Minnesota. "Report and Recommendations of Title IX. Intercollegiate Athletics, Recreational Sports, Physical Education." [Minneapolis]: University of Minnesota, July 2, 1976.

Van Alstyne, Carol and Coldren, Sharon L. *The Costs of Implementing Federally Mandated Social Programs at Colleges and Universities.* Washington, D.C.: Policy Analysis Service, American Council on Education, June 1976. ED 131 823. MF-$0.98; HC–$5.11.

Weinberger, Casper W. *Sex Discrimination Regulations. Hearings before the Subcommittee on Postsecondary Education of the Committee on Education and Labor, House of Representatives, Ninety-Fourth Congress, First Session.* Hearings held in Washington, D.C., June 17, 23-26, 1975. ED 118 012. MF-$0.98; HC-$35.49.

Willard, Donald S. "A Time to Retire: Raising the Mandatory Retirement Age," Portfolio, *NACUBO Business Officer*, November 1977, p. 12-14.

## FOOTNOTES

[1] It would be a herculean task to review comprehensively the impact of all federal statutes regulations, and Executive Orders affecting higher education. One source ("Compendium of Federal. . .," 1977) cites fifty-nine such regulatory authorities, and an additional four hundred grant programs. This report focuses on six major federal programs: Executive Order 11246, as amended; Title IX of the Education Amendments of 1972; Section 504 of the Rehabilitation Act of 1935, as amended; the Employee Retirement Income Security Act (ERISA) of 1974; and the Age Discrimination in Employment Act (ADEA) of 1967, as amended.

[2] Strictly speaking, the Executive Order might be classified as an employment-related obligation but the Department of Labor delegated its enforcement responsibilities to the Office for Civil Rights in the Department of Health, Education, and Welfare, which has developed guidelines tailored to the needs of higher education institutions (see "Format for 1975"). This enforcement responsibility reverted to the Labor Department's Office of Federal Contract Compliance Programs on October 1, 1978.

[3] These are certain religious institutions, military schools training students for the armed forces, the admission programs at private undergraduate colleges, and single-sex public institutions.

[4] Civil Action No. 74-1720 in the District Court for the District of Columbia, December 29, 1977.

[5] Buildings constructed in conformity with the Architectural Barriers Act of 1968 (42 U.S.C. 415) should meet handicapped individuals' needs.

[6] However, if an institution offers a "'reasonable choice'" of one or more tax-deferred annuities (TDA) to its employees, the college need not meet annuity reporting requirements. ERISA defines a TDA as a "program under which all premiums are over and above any required retirement plan contributions and are remitted through salary reduction" (TIAA-CREF, 1977c, p. 2). "Reasonable choice" is established by meeting specific ERISA criteria.

[7] Colleges and universities must meet innumerable statistical reporting requirements in areas not discussed in this report (such as enrollment), and these may be complicated and burdensome. See, *A Report of the Commission on Federal Paperwork, Education.* Washington: Government Printing Office, April 29, 1977. ED 144 203. MF-$0.98; HC-$7.00.

[8] These programs are: Title IV of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972; the Equal Pay Act of 1963; Executive Order 11246, as amended by Executive Order 11375 (Affirmative Action); the Age Discrimination in Employment Act of 1967, as amended (this excludes the age 70 limit); Fair Labor Standards Act of 1938, as amended; the Social Security Act of 1935, as amended; the Employment Security Amendments of 1970 (this includes both unemployment compensation and Social Security tax increases); the Health Maintenance Organization Act of 1973; the Employment Retirement Income Security Act of 1974; the Economic Stablization Act of 1970 (public institutions were exempted; private institutions were exempted in 1974); the Occupational Safety and Health Act of 1970; and regulations implemented under several laws by the Environmental Protection Agency.

# 12. UNIT DETERMINATION: BASIC CRITERIA IN FEDERAL AND STATE JURISDICTIONS

Joseph N. Hankin

*President, Westchester Community College*

Collective bargaining in higher education is a relatively recent phenomenon. A good brief history may be found in an Eric Publication authored by Daniel Julius entitled, "Collective Bargaining in Higher Education: The First Decade." The present extent of collective bargaining in American colleges and universities may be followed in a series of publications sponsored by the National Center for the Study of Collective Bargaining in Higher Education and by the Academic Collective Bargaining Information Service.

Dividing Gaul into three parts was relatively simple in contrast to the tasks which the National Labor Relations Board and state agencies, boards, and commissions have had in making unit determination decisions. Unit determination decisions and cases in the higher education realm have largely drawn upon the private industrial sector experience, with some interesting exceptions.

Today I shall merely hit some of the highlights. If you are interested in learning more about this subject, I would refer you to the proceedings of this conference which will contain full references to the cases I shall briefly cite today.* There are also several good references on this subject:

1. Barbara C. David, "The Legal Aspects of Unit Determinations in Faculty Collective Bargaining at Public Institutions of Higher Education," a doctoral dissertation completed at Georgia State University in 1976. (The title is really inaccurate, for it traces in great detail the private college experience too.)
2. Joyce M. Najita, "Guide to Statutory Provisions in Public Sector Collective Bargaining: Unit Determination, Third Issue," University of Hawaii, April 1977.
3. Doris Ross, "Cuebook: State Education Collective Bargaining Laws," Report No. F78-9, Denver, Colorado: Education Commission of the States, October 1978.

It is easy to get confused – for there are seemingly contradictory determinations. I would like to give you some examples in each of six categories.

### 1. Supervisory and Managerial Personnel

In the *C. W. Post* case deans were excluded as supervisors and not joined in the faculty unit because they effectively recommended the employment of faculty, but in the *University of San Francisco* and *Catholic University of America* cases assistant and associate deans in the Law School were included in the faculty units.

Similarly, department chairpersons have been held to be in or out of the unit (for example, in *the Fordham University* case and *out* in the *Adelphi University* case), depending on circumstances which we shall discuss shortly, and have even been held to be *out* of the unit and later included *in* as these circumstances changed, as in the second *Fairleigh Dickinson University* case.

---

*See Page 97 *et seq.*

Here too there are seeming contradictions in both National Labor Relations Board and state agency determinations: in the *Fordham University* case the National Labor Relations Board allowed the creation of a separate unit of the Law School faculty although the administration objected and the competing labor organizations concurred.

In the *Syracuse University* case, both the labor organization and the administration sought inclusion in one unit, but the National Labor Relations Board permitted a separate Law School unit.

In the *University of Vermont* case, the Medical School faculty were excluded despite the fact that two of the labor organizations would have been willing to include them.

In the *Wayne State University* determination, the State Commission included the Medical School faculty in the university-wide unit even though the competing labor organizations wanted to exclude it.

In the *University of Minnesota* case, separate units were permitted for the Schools of Law and Health Sciences, but not for the College of Veterinary Medicine.

In the *University of Minnesota* case, separate units were permitted for the Schools of Law and Health Sciences, but not for the College of Veterinary Medicine.

In the *University of Florida* determination, the state Public Employment Relations Board established separate units for the Law School, Health Center, and the Institute of Food and Agricultural Sciences, but declined a separate unit for the Engineering faculty.

### 2. Multi-Campus Units

Although some states (e.g., Hawaii) have settled the matter of multi-campus inclusion/exclusion by legislation, more commonly the National Labor Relations Board or state agencies have decided these issues. But, again, we have seemingly contradictory conclusions. The National Labor Relations Board, for instance, allowed the creation of separate units for each of three campuses in the *Long Island University* case, but only one unit for the three campuses in the *Fairleigh Dickinson University* case. Rhode Island has separate units for each of the State's three public institutions, while New York has one.

A number of states have favored one larger unit for their public institutions (e.g., Pensylvania, Florida, and Vermont), while others (e.g., New Hampshire, Montana, and Nebraska) have determined that each separate campus represents an appropriate community of interest.

Garbarino, Feller, and Finkin reported on two interesting examples in the states of New Jersey and Minnesota. Ten years ago, in 1969, the New Jersey PERC created separate units for each of the six state colleges. However, each of the campuses selected affiliates of the same representing organization and negotiated, not with the local boards, but with the New Jersey Board of Higher Education, resulting in a single statewide agreement. When, subsequently, a competing organization sought to oust the incumbents on several campuses, the state argued for and won a single unit.

In Minnesota the state PERB held for separate campus units for the state colleges, but the Supreme Court of Minnesota disagreed, reversing the ruling. Later, the PERB refused to follow the Court's reasoning in determining the appropriate unit for the University of Minnesota, and determined that each of the University's five campuses was an appropriate unit. As indicated earlier, however, it has since been judicially determined that separate bargaining units be established for the Law and Health Sciences faculties, with all other faculties at the main campuses included in a single unit statewide.

### 3. Support Professionals

Now we get into even more complicated contradictions. Librarians have been included in a common unit in cases such as the *University of Vermont and State Agricultural College,* and *University of San Francisco,* but excluded in the *Claremont Colleges* case. In the *Catholic University of America* case, a head librarian, with supervisory authority over two assistant librarians who were included in the unit, was excluded; if such a person, however, devotes less than 50 percent of his or her working time to supervising non-unit employees, he or she may be included in the faculty unit, according to the *Mt. Vernon College* case. To further complicate matters: in the recent *Boston University* case, a unit of professional librarians at the main and satellite libraries, but excluding librarians in the Law, Medical, and Theology schools, was deemed appropriate.

Then there is the case of counselors: guidance counselors have been found to be included, in the *Northeastern University* case, but admissions counselors were excluded.

NTP's are placed in one all-inclusive unit in the *State University of New York,* but form their own separate unit in the *Pennsylvania State College System.* In Michigan, the MERC refused to accept its own trial examiner's exclusion of NTP's from the faculty bargaining unit in the *Eastern Michigan University* and *Wayne State University* cases, but the decision was reversed by the state Court of Appeals. Needless to say, other states have lined up on both sides of this issue. Given similar circumstances, in two neighboring states we sometimes get two different determinations.

What about faculty members who are also engaged in administering programs outside their teaching responsibilities? These "principal investigators" are included in the faculty unit if the employees they supervise are not in the unit, according to the *New York University* case, but are excluded if they hire other faculty members to assist in the program, as in the *Rensselaer Polytechnic Institute* case and the *University of Vermont* case. In Maine the state board recently ruled that "soft money" faculty qualified for inclusion in the regular unit, although they were ineligible for tenure.

An issue has arisen in the case of nurses in teaching institutions. In 1974 the National Labor Relations Board was amended so as to eliminate the statute's exclusion of private hospitals and clinics. In 1975 in the *Goddard College* case the National Labor Relations Board ruled that nurses do not share a sufficient community of interest with faculty to warrant inclusion in the faculty unit. Other cases have included nurses occasionally.

Perhaps a classic group with regard to confusion are interns, residents, and clinical fellows, otherwise known as "housestaff." In the *Cedars-Sinai Medical Center* case they were held to be not "employees" within the meaning of the National Labor Relations Act but students continuing their medical education. However, contrary to the findings in this case, the Prince George's County (Md.) PERB hearing officer ruled that such persons were students who were also employees. Most recently the U.S. Court of Appeals for the District of Columbia instructed the U.S. District Court for the District of Columbia to reconsider its previous ruling that it did not have authority to judicially review the 1976 certification proceeding, saying that Congress intended housestaff to be covered by the National Labor Relations Act.

### 5. Part-Time Personnel

In the earlier cases like *University of New Haven*, regular part-time faculty were included in the same unit as full-time faculty. This ruling was to have been applied unless the parties in other cases agreed to exclude them, as occurred in the *Fordham University* case. However, the National Labor Relations Board reversed itself in the *New York University* case, quoting Justice Felix Frankfurter's observation that "wisdom too often never comes, and so one ought not to reject it merely because it comes late." In the public sector, state agencies have divided on the issue, with some units including part-timers and others excluding them. Exceptions have been made by the National Labor Relations Board to the *New York University* rule. In the *Kendall College* case, for example, part-timers who were paid on a per-course basis, similar to adjunct faculty at N.Y.U. and elsewhere, were excluded, while those paid on a pro-rata salary (and who were like full-time faculty in participating in college governance) were included. Interestingly, in the *Cottey Junior College* case, administrators, who would normally be excluded from the faculty unit but who taught on a part-time basis, were included in the faculty unit.

### 5. Miscellaneous Personnel

Closely related to part-time employees are several classes of "temporary" employees. In the *Santa Monica Community College District* case, the California Court of Appeals affirmed a lower court decision which classified part-time teachers as temporary, hence ineligible for inclusion. In Connecticut the state board found that a teacher employed for more than one-half of an average load for only one term, but not a full-time academic year, was covered because the statute did not exclude temporary employees. Excluded, however, are those who worked less than seven and one-half contact hours in any one semester. The case is on appeal.

The Minnesota Supreme Court ruled that teachers employed for less than 100 days to fill positions left vacant by faculty members on leaves of absence are not public employees under the state act and are not to be included in the bargaining unit. In New Hampshire the state Supreme Court affirmed a PERB decision that lecturers at *Keene State College* were temporary employees not entitled to collective bargaining rights under the state law. In California a state board hearing officer ruled that summer school employees in the *Anaheim Union School District* were entitled to placement in a separate unit; while this has not yet been extended to the area of higher education, the reasoning could well be the same.

Similarly in the private sector, according to Fanning, the NLRB has ruled on questions relating to unit determination for temporary, part-time, and emeritus faculty. In the *Stevens Institute of Technology* case, a visiting professor on a one-year contract to replace a professor who was on sabbatical leave was excluded as temporary, while in the *Manhattan College* case, "terminal-contract" faculty who had been informed that their contracts would not be renewed were held to be eligible to vote in a representation election. In the *University of Vermont and State Agricultural College* case emeritus faculty were excluded unless they teach full-time, whereas in the *University of Miami* case, faculty holding non-tenure track positions were found to have a sufficiently close community of interest to be included. According to Walther, in the *Goddard College* case an NLRB panel concluded that since the record indicated that only 5 to 10 percent of the visiting faculty were offered permanent positions, their work was temporary and they were not entitled to be placed in the same unit with full-time faculty. However, in the *Community College of Philadelphia* case, the state board found a community of interest with full-time faculty, and hinted that they should be placed in the same unit; on the basis of the petition before them it was not possible to do so, so the visiting lecturers were granted their own separate unit.

## General Criteria

There are other employee groups, but in the interest of time, I should like to move on to the criteria employed in cases of the type cited. What general principles can we distill from this welter of cases and sometimes seemingly contradictory findings?

Frequently in higher education we have studies which contradict one another; for example, the influence of class size on instruction, the influence of using television to supplement the classroom presentation, etc. While the cases cited above often seem to contradict each other, the decisions are usually based on an analysis of particular situations at each institution, on a case-by-case basis, and we can generalize from the findings.

The over-arching criterion, "community of interest," developed from the private industrial sector. A relatively long list of criteria or factors has developed to measure or determine whether there is a "community of interest" or other compelling reason to join faculty members and others in an appropriate bargaining unit for purposes of collective negotiations. First, there is a list of National Labor Relations Board "community of interest" criteria, summarized in the *St. Francis College* case:

> Similarity in the scale and manner of determining earnings;
>
> Similarity in employment benefits, hours of work, and other terms and conditions of employment;
>
> Similarity in kinds of work performed;
>
> Similarity in qualifications, skills, and training of employees;
>
> Frequency of contact or interchange among employees;

Relationship to the administrative organization of the employer;

History of collective bargaining;

Desires of affected employees; and

Extent of union organization.

In addition, both the NLRB and state agencies, boards, and commissions, in the cases cited in this paper, have utilized these additional measures, some of which overlap the list above:

Similarity in job classification and/or title, the methods by which these are determined, and the statutory authority of the public employer;

Centralization of management;

Competing claims of bargaining representatives and the administration;

Interdependence or autonomy of schools and campuses, including differences in calendars, faculty-student ratios, funding sources, etc.;

Commonality of supervision;

Educational requirements and specialized training;

Administrative level of authority;

Extent of integration of work functions;

Separate accredition status;

Professional identification-allegiance;

Principles of efficient administration of government;

Effects of overfragmentation;

Geographical location;

Compatibility of the unit with joint responsibilities of the employer and employees to serve the public; and

Sound or effective employer-employee relations.

And, of course, the ubiquitous:

Other factors deemed appropriate.

## Open Questions

Finally, for purposes of generating further discussion, there are several questions which should be raised:

There may actually be more than one appropriate unit, but the NLRB and state agencies need not choose the most appropriate unit, merely *an* appropriate unit. In fact, with regard to professional school faculty the NLRB recognized in a series of cases that both inclusive and separate units were equally appropriate, leaving the ultimate determination to the desires of the faculty. When this occurs, faculties may choose for the right or wrong reasons. For instance, a Law School faculty may feel that in an inclusive unit it would have to subsume its voice in dealing through a university-wide collective bargaining agent, and that it might be given short shrift in matters of special interest and salary.

Of course, in filing unit determination petitions, both sides are tempted to include or exclude those elements of the faculty and staff who are pro- or anti-unionization in order to affect the outcome of the election. For example, Kelley and Gerry have shown that faculty unions wishing to exclude religious faculty from the bargaining unit have cited conflict of interest and poverty vows in order to exclude from the unit those perceived to be less than enthusiastic about collective bargaining. Fortunately, the NLRB and alert state boards, utilizing the well-accepted criteria, are quick to see through such maneuvering. But what if they do not?

There is the danger that the administration might want to "divide and conquer" and hence permit "internal balkanization," as Finkin has put it. But the administration may well be faced with overfragmentation, may have to deal on too many fronts, and may be subject to "whipsawing" by the units right on its own campus. The bargaining representative, on the other hand, wanting to add as many dues-paying members as possible, and for other reasons, could end up with a diversity of interests in the same unit, and might find that it would have to accommodate to all. Finkin quite properly points out that "inclusion of groups heretofore unrepresented in governance and the exclusion of others who in the past may have been considered colleagues will have some effect on institutional decision-making." Among the dynamic complications, he notes, is the fact that "as each new group with diverse interests is included in the unit, the bargaining agent must work to bring it and its particular needs and concerns into the organization, so that it can be adequately represented." Failure to do so, I contend, can lead to centrifugal pulling away from the unit on the part of those groups which perceive themselves to be inadequately represented.

A second major question which should be faced was raised by John H. Fanning, chairman of the NLRB, in dissenting from a series of law school and medical school cases. He found that faculty members, for the purposes of the NLRB, are not unique, that the differences in industry between craft groups and other employees are greater than the differences between law and medical faculty and other faculty. Others like Chandler and Julius have noted that the trend toward segregating professional school faculty into their own collective bargaining units resembles the creation of specialized unions of craft workers in industry, and that some of the criteria employed could well be extended to almost any professional school, and perhaps to some academic departments. Surely this question, interrelated to the last one about fragmentation, will have to be addressed in the near future. Finally, are we inviting in too many outsiders – legislatures and courts – in making educational and academic decisions, and perhaps other unwanted bargaining representatives into the curriculum? Perhaps in this regard it would be wise if the lion and the lamb should lie down together, remembering, of course, Woody Allen's admonition: the lamb may not get much sleep. We all might not, however, if we do not resolve some of these questions.

## CASES CITED

Adelphi University, 195 NLRB 639 (1972)

Adelphi University, 79 LRRM 1545, at 1556 (year?)

Bell Aerospace Co. v. NLRB, 416 U.S. 267 (1974)

Boston State College, MLRC No. SCR-35 (1969)

Boston University, 236 NLRB 199 (1978)

Catholic University of America, 201 NLRB 145, 929 (1973)

Cedars-Sinai Medical Center, 223 NLRB 251 (1976)

Claremont Colleges, 198 NLRB 811 (1972)

Trustees of Columbia University in the City of New York, 97 NLRB 424 (1951)

Columbia University, Teachers College, 226 NLRB 193 (1976)

Cornell University, 183 NLRB 329 (1970)

Cornell University, 202 NLRB 290, 41 (1973)

Cottey Junior College, 17-RC-7979 (unpublished) (1976)

University of Detroit, 193 NLRB 95 (1971)

Duke University, 194 NLRB 236 (1971)

Duke University, 200 NLRB 81 (1972)

Duke University, 217 NLRB 799 (1975)

Duke University, 227 NLRB 232 (1977)

Eastern Michigan University, MERC Case Nos. R70K-407, R71-A-2 (1972)

Board of Regents of Eastern Michigan University v. Eastern Michigan University Chapter, AAUP, 46 Mich. App. 534, 208 N.W. 2d 641 (1973)

Fairleigh Dickinson University, 205 NLRB 101, 673 (1973)

Fairleigh Dickinson University, 227 NLRB 40 (1976)

Fitchburg State College (Massachusetts), MLRC No. ER-151 (1971)

Florida State University System, Board of Regents, Florida PERC No. 8 H-RC-745-002 (February 5, 1976)

Fordham University, 193 NLRB 134, 23 (1971)

Fordham University, 214 NLRB 137 (1974)

Georgetown University, 200 NLRB 215 (1972)

Goddard College, 216 NLRB 81 (1975)

Goddard College, 216 NLRB 457 (1975)

Goddard College, 88 LRRM 1228 (1975)

Harvard College, 95 LRRM 1390 (1977)

University of Hawaii, H. PERB No. R-07-12 (1972)

Howard University, 211 NLRB 247 (1974)

Illinois Institute of Technology, 81 NLRB 152 (1949)

Kalamazoo Paper Box Corporation, 136 NLRB 134, 137 (1962)

Kansas State College, Kansas PERB No. UE2-1974 (1974)

Kendall College, 13-RC-13911 (unpublished) (1976)

Kendall College v. NLRB, No. 77-1418, February 17, 1978, 97 LRRM 2878-81, March 13, 1978

Los Rios Community College District, 1 PERC 185 (1977)

Macke Company, II 2-RC-16725 (unpublished)

Manhattan College, 195 NLRB 65 (1972)

Manhattan College, 79 LRRM 1253, 1254 (1972)

University of Massachusetts, MLRC Nos. SCR-2079, SCR-2082 (1976)

University of Minnesota Board of Regents, Minnesota PERB Case Nos. 73-PR-571A, 74-PR-59A, 74-PR-66A, 74-PR-93A (1975).

Regents of the University of Minnesota v. PERB, No. 408812, 1977

Northern Montana College, Montana Board of Pers. Appeals, Unit Determination No. 55 (1975)

Mt. Vernon College, 228 NLRB 153 (1977)

AAUP, University of Nebraska v. Board of Regents of the University of Nebraska, Case No. 150 (Nebraska Court of Industrial Relations, 1975)

University of New Hampshire System, New Hampshire PERB, N. U-0601 (1976)

University of New Haven, 190 NLRB 102, 478 (1971)

The State Colleges of New Jersey, N.J. PERC No. 1 (1969)

State Colleges of New Jersey, Report and Recommendations of Hearing Officer, at 7 (1969)

State of New Jersey, PERC No. 72, Hearing Officer's Report and Recommendations, at 14 (1972) (memorandum opinion)

New York University, 205 NLRB 16, 4 (1973)

New York University, 221 NLRB 1148 (1975)

New York University, 91 LRRM 1165 (1975)

New York University, v. NLRB 360 F. Supp. 160

Northeastern University, 218 NLRB 40, 247 (1975)

Northeastern University, 89 LRRM 1862 (1975)

Oregon State System of Higher Education, Case No. C-277, C-319, C-326, C-375, C-320 (October 31, 1974)

Commonwealth of Pennsylvania (13 State Colleges and Indiana University of Pennsylvania), PERA-R-775 (1971)

Pennsylvania State University, PERA-R-801 (1973)

College of Pharmaceutical Science, 197 NLRB 959 (1973)

University of Pittsburgh (Johnstown Campus), PERA-R-2626 (1973)

University of Pittsburgh, PLRB PERA R-5237-W et al (1976)

Point Park College, 85 LRRM 1542, 1545 (1974)

Port Arthur College, 92 NLRB 152 (1950)

C.W. Post Center of Long Island University, 189 NLRB 79 (1970)

C.W. Post Center of Long Island University, 189 NLRB 904, 110 (1971)

Rensselaer Polytechnic Institute, 218 NLRB 1435 (1975)

University of Rhode Island, RISLRB No. EE-1961 (1971)

Board of Trustees of State Colleges (R.I.), RISLRB No. EE-1845 (1969)

St. Luke's Episcopal Hospital, Texas Children's Hospital, Texas Heart Institute, 222 NLRB 109 (1976)

Salem State College (Massachusetts), MLRC (Unnumbered), (1973)

San Francisco Community College District, 2 PERC 2003 (1977)

University of San Francisco, 207 NLRB 15, 12 (1973)

San Joaquin Delta, EERB Case S-R-459 (1977)

Leland Stanford Junior University, 194 NLRB 1210 (1972)

Leland Stanford Junior University, 214 NLRB 621 (1974)

State University of New York, N.Y. PERB, para. 2-3070 (1969)

State University of New York, N.Y. PERB No. C-0991 (January 21, 1974)

Stevens Institute of Technology, 222 NLRB 16 (1976)

Syracuse University, 204 NLRB 641, 85 (1973)

Temple University, 194 NLRB 1160 (1972)

Temple University, PERA-R-1123E, 1137E (1972)

Tulane University, 195 NLRB 329 (1972)

Tusculum College, 199 NLRB 28, 006 (1972)

Tusculum College, 81 LRRM 1345, 1349 (1972)

Tuskegee Institute, 209 NLRB 773 (1974)

Tuskegee Institute, 221 NLRB 944 (1975)

Vanderbilt University, 218 NLRB 1076 (1975)

Vermont State Colleges, SELRB No. 73-6 (1973)

University of Vermont and State Agricultural College, 273 NLRB 137 (1974)

University of Vermont and State Agricultural College, 223 NLRB 46, 423 (1976)

Wayne State University, MERC Case Nos. R71B-58, R71B-75, R71B-79, R71C-137 (1972)

NLRB v. Wentworth Institute and Wentworth College of Technology, 515 R.2d 550 (1975)

Westfield State College (Massachusetts), MLRC No. ER-184 (1973)

Worchester State College (Massachusetts), MLRC No. ER-92 (1970)

NLRB v. Yeshiva University, 98 LRRM 3245 (1978)

Yeshiva University, 221 NLRB No. 169 (1975)

# 13. THE LIMITS OF ARBITRABILITY IN HIGHER EDUCATION DISPUTES

Theodore Lang
*Baruch College*

I will talk of five principal areas, including (1) the distinctions between grievable and arbitrable issues; (2) who determines arbitrability; (3) substantive issues of employment status in regard to grievability and arbitrability; (4) the authority of the arbitrator; and (5) remedies available. I will rely a great deal upon your knowledge and experience in the field and will not go into some of the simpler matters concerning the definitions of grievances and arbitration.

I think the most important thing that any of us in this business has to learn is that the grievance process–the substance of the grievance, the arbitration process, the definition of arbitrability, the powers of the arbitrator–all are creatures of the contract. We can generalize about them, but you must refer to the specific contract of the specific agency for the definitions. What is defined elsewhere, what is said in other contracts, the consensus on what a definition should be, are completely irrelevant and immaterial. It's what *your* contract says that determines what is a grievance and what is arbitrable. Since you are responsible, in many cases, for what your contract says, you do have a great deal to say about what is a grievance and what grievances are arbitrable.

### Defining Grievances

Let us consider first the distinctions between grievable and arbitrable issues. Grievances may be narrowly or broadly defined. In higher education, about half of the contracts provide narrow definitions, about half provide broad definitions. A narrow definition of a grievance would be a claimed violation, misapplication or misinterpretation of the terms of the contract, and this is found in contracts throughout the nation. A broad definition of a grievance would include the previous items plus violations of bylaws or policies of the agency, any inequity, or dissatisfaction which is felt by a member of the bargaining unit. Thus, you have a spectrum of definition.

It is pretty much understood that unions will seek the broadest possible definition of a grievance and management will seek the narrowest.

As I said, half the contracts in higher education define grievances narrowly and about half define them broadly. In the private sector, however, a paper that analyzes grievances reports that two-thirds of the contracts define grievances narrowly and one-third define them broadly. It is my perception that the more mature the bargaining, grievance and arbitration are in a jurisdictuion, the greater the tendency to move towards narrow definition, towards limiting grievances to contract violations.

As in the case of the definition of what is grievable, what is arbitrable is also defined in the contract. What has been said about grievances applies to the definition of what is arbitrable: it could be narrow, it could be broad, or anywhere in between. An interesting point worth noting is that it is possible to have a broad definition of grievance and a narrow definition of arbitrability. Let me read one such definition to you to illustrate that point from the expired contract of Lehigh County Community College:

> Any complaint alleging a specific violation, misinterpretation, improper application of the terms and conditions of this agreement, may be processed as a grievance under the contract. The alleged arbitrary or discriminatory enforcement of the College's rules and regulations relating to wages, hours, terms and conditions of employment, may be processed as a grievance but shall not be arbitrable under Section–of the contract.

Here you have a broad definition of grievance but a restriction on the arbitrability of certain violations of the contract.

Another important insight: you cannot rely solely upon the definition of what is arbitrable to decide whether a jurisdiction or an agency really has a narrow definition. You can have a narrow definition of what is arbitrable but have so many clauses in the contract that the contract itself is so broad that *de facto* you have broad arbitrability. For example, if you have a very broad contract that covers governance, then governance may be arbitrable. If you have a very broad contract that covers personnel actions and the peer judgment process, then such actions and the peer judgment process may be arbitrable. If you have a broad past practice clause and a narrow definition of arbitrability, past practice may be arbitrable unless the definition has been refined to exclude it. Consequently you cannot rely merely on the definition of what is arbitrable in order to know in fact whether the parties have agreed to submit a broad area to the arbitrator.

The courts play a role and the arbitrators themselves play a role. In New York State, the courts play the first role, if a party chooses to go to the courts. In a demand for arbitration by the American Arbitration Association in the New York City area, the party who is served has twenty days in which to go to court to stay the arbitration on the basis of a challenge to arbitrability.

The second authority to determine arbitrability is the arbitrator himself. Bypassing court action, the party may assert before the arbitrator that the issue is not arbitrable and then the arbitrator has the authority to determine it.

A third possibility is recourse to the courts *after* the arbitration. Here you have a mixed bag, depending upon the locale as well as the law. Yet to seek a ruling on arbitrability after the arbitrator has determined the issue is risky. The courts are likely to feel that since the arbitrator has passed on the question, they should not interfere with his decision.

### Employment Status

This is a major problem area in higher education because of the existence of peer judgment determinations, academic judgments on appointments, reappointments, tenure, promotions and the like. A study of contracts in higher education shows that, again, about half of the contracts allow substantive decisions of this nature to go to the arbitrator, and half do not. My sense is that this will be a major battleground in the future. Management is becoming extremely sensitive to this area and is now fighting to forbid arbitrators to make substantive decisions in regard to personnel actions. I call your attention, however, to the fact that *procedural defects* will almost always be handled by the arbitrator.

Two questions arise in connection with employment status. One is procedural: did the person get adequate notice–did the issue go to the proper committee, etc.? Such issues are frequently put before the arbitrator. The second question is substantive: was the faculty member qualified for reappointment or for promotion? Here there is a split as to whether the issue may go to an arbitrator.

Let me cite two different kinds of clauses in contracts. One is procedural, taken from an old State University of New York contract: "If the arbitrator determines that this agreement or the procedural steps specified by policy articles have not been followed, etc., the arbitrator shall direct that the matter be reconsidered by the appropriate official." Note that he can find a fault in procedure but he cannot make the academic judgment; he must remand the issue to the appropriate authority.

Compare that with a University of Hawaii contract that has also expired now: "In any grievance involving the employment status of a faculty member, the arbitrator shall not substitute his judgment for that of the official making such judgment, unless he determines that the decision of the official is arbitrary or capricious."

In effect, there are three degrees of arbitral authority in matters of substance: (1) the arbitrator cannot substitute his judgment at all; (2) he can substitute his judgment where he believes the decision-makers were arbitrary or capricious; and (3) he can substitute his judgment in any case based upon the evidence presented to him.

### The Arbitrator's Authority

Let me explore further the issue of the arbitrator's authority. This also is generally defined in the contract, so you have to go the contract to find out, in part, how the parties have defined the authority of the arbitrator. Whether the arbitral decision is final and binding or merely advisory is generally stated in the contract.

Some 90 percent of the contracts call for final and binding arbitration, about 10 percent call for advisory arbitration. Unions are rarely satisfied with advisory arbitration, because it goes against the essence of the principle of equality of the parties. They will always fight for binding arbitration.

Of course when you move from advisory arbitration to binding arbitration, if you are management, you must do it with great caution. You have to examine your whole contract to see whether there are many areas that ought to be changed because now, when you go to binding arbitration, you are allowing a third party to make the final decision on interpretation of the agreement.

An interesting point that comes up from time to time is whether the arbitrator may permit issues to be added to those presented initially in the formal grievance. Can an arbitrator take up an issue which was not in the formal grievance? There are many refinements of this question. Can the arbitrator consider an argument other than arguments mentioned in the original grievance? Can the arbitrator consider facts other than those raised in the preliminary, pre-arbitral grievance procedures? I think the weight of authority is that the arbitrator can allow the grievant to *modify* a great deal of the grievance but not to present a clearly new issue.

The contract usually defines the basis on which the arbitrator is to reach his conclusion. The kinds of limitations are generally these: he cannot go beyond the contract; he cannot amend the contract; he cannot order an illegal act; he cannot interfere with certain managerial prerogatives. Some contracts limit what the arbitrator may say in his opinion and require that his discussion relate only to the issue and to matters that are necessary to decide the issue. In such cases, the intention is to restrain the arbitrator from deciding collateral issues. This is accomplished by language like the following: "Nor shall observations or declarations of opinion not essential to the reaching of the determination be submitted."

### Comment on Remedies

It is assumed that when a matter goes to an arbitrator he has the power to fashion a remedy, but that power can be limited in the contract. The contract does not have to say expressly that he has the power to fashion a remedy. It is assumed that he has that power; otherwise, there would be no point in going to the arbitrator.

Three types of remedies are available. One is money; the second is some personnel action; and three involves the most elite of all the personnel actions, the granting of tenure.

On money, generally, an arbitrator will try to make the grievant whole so he suffers no loss. That is called compensatory damages. The arbitrator will rarely award punitive damages, compensation beyond what the grievant would have earned were it not for the mischievous action of the administration. The arbitrator will always take into consideration mitigating factors–for example, if the grievant was employed elsewhere, whatever he earned would be deducted from what the university owes him. Sometimes the arbitrator cannot make the grievant whole because time has passed; then he just fashions whatever remedy he can to bring the grievant as close as possible to recovery.

Let me conclude by re-emphasizing the point I made at the outset, namely, that it's a mistake to overgeneralize in regard to grievances, arbitration and the powers of the arbitrator because so much depends upon the specific contract. You must be concerned with the language in your contract and you must work to build the kind of contract with which you can live.

103

# 14. THE TENURE SYSTEM—I

Margaret Schmid

*President, Faculty Federation, AFT*
*Northeastern Illinois University*

The intensity of debate over tenure varies with the largesse of the public and private holders of the higher education purse strings, the relative percentage of older (and therefore largely tenured) and younger (and therefore largely untenured) faculty, the ratio of new PhD's to available faculty positions, and the amount of discomfort caused higher education management by alleged faculty or student "misbehavior."

Positions taken on whether tenure should be strengthened, modified, weakened, or abolished depend largely on whether one's ox is currently being gored.

## The Issues

Otherwise stated, the tenure debate, to be fully comprehended, must be seen in very pragmatic terms. It is, at bottom, a debate on two issues: one, whether, how, and for what reasons a faculty member whose performance has been accepted as satisfactory over a period of years can be dismissed; two, whether the commitment to academic freedom, a commitment tied directly to tenure, will be maintained.

Dismissals of tenured faculty have, of course, occurred, and the specified reasons for them have been numerous and varied. Offenses against benefactors of private institutions are one category, sometimes in the form of objectionable private behavior-become-public, sometimes in the form of objectionable public utterances. Offenses against benefactors of public institutions comprise another category taking the same basic forms, although more heavily affected by prevailing political sensitivities.

Lack of funds – financial exigency, as we call it in the trade – is another category, and one which is of great current interest. Lack of students is yet another, also of great current interest. (Far too seldom, one might venture to suggest, have such dismissals occurred because of demonstrated incompetence.)

## Academic Freedom and Security

Many of these reasons bear directly on questions of academic freedom, and hence on the matter of commitment to maintenance of full and open exploration and debate of new ideas and proposed alternatives to the accepted truths. When beliefs about religion, the economic system, or the propriety of using the right of eminent domain to expand the institution into the surrounding neighborhood – or the decision to use an X-rated film or hypnosis to make a point in class – become the grounds for dismissal, academic freedom has been blatantly violated. Whether such dismissals come from the outrage of an individual benefactor, an offended governing board, or as a result of hostile and perhaps consciously cultivated "public opinion." the effect is to suggest rather strongly that there is a line to be observed at the risk of losing one's position.

Others of these reasons – lack of funds or of students, for example, raise questions less related to academic freedom but tied directly to questions of whether faculty are entitled to reasonable assurances of security in their profession. Current adverse financial conditions as well as changes in the demographic base of college and university students have led to vastly increased institutional demands for "flexibility" in dismissals of tenured faculty, raising the question of faculty security in a somewhat new and definitely urgent form.

Throughout, faculty have continued to attempt to secure academic freedom and achieve professional security. This enduring attempt has come collectively to be known as the struggle for tenure; hence our topic today.

### Historical Background

Tenure, at base, is an institutional guarantee of continuous employment subject to dismissal for cause. The institution must bear the burden of proof.

As we know it today, tenure evolved as part of early faculty attempts both to gain academic freedom and achieve a reasonable degree of job security. While the historical events remembered as part of this process were largely responses to abuses of academic freedom, one must suspect that the increasingly legalistic, bureaucratic, and codified nature of the American societal context had an independent effect. In fact, tenure evolved as part of the rationalization of academia.

The AAUP was instrumental in establishing a standard against which institutional practice could be assessed. A definition of tenure was established, a standard probationary period defined, and procedures were adopted for the dismissal of tenured faculty. We cannot, however, properly speak of "the tenure system," for variations abound. The basic concept of tenure is itself under attack in some quarters. Enforcement of the AAUP standards on tenure is problematic, in part because of the typical absence of any effective enforcement mechanism, and in part because of the varying interpretations which can be legitimately given to many of the provisions of those standards.

At present, three major tendencies appear at work setting the stage on which the tenure debate continues:

1. Attempts by higher education management to weaken tenure so as to make it easier to eliminate faculty in response to changes in "market conditions" (student "demand" for specific courses or training, changes in student enrollment patterns) and to largely adverse changes in the financial environment (so as to make reductions in faculty and staff a more readily available method for resolving financial problems).

2. Attempts by faculty to strengthen tenure more directly to meet threats to established faculty positions stemming from changes in the above-noted "market" conditions and the financial environment, and forming the more general and more significant context in which the above are being played out.

3. Attempts, likely without specific consciousness, to further rationalize academia. This is occurring predominantly through collective bargaining, which has the effect of defining, formalizing, establishing boundaries, and providing effective mechanisms for the resolution of disputes, even in those institutions

which do not have collective bargaining but which react in response to its presence elsewhere. Specification of the job rights of faculty and of the mechanisms for protecting academic freedom are inevitable concomitants of the collective bargaining process. The faculty-administration struggle over the future of tenure will be resolved in the main in the collective bargaining arena.

## Alternative Models

Before discussing the interface between collective bargaining and tenure, I wish to consider specifically alternatives to tenure such as so-called cyclical tenure or renewable multi-year contracts. Such alternatives would replace an institutional commitment to continuous employment, subject only to dismissal for cause – that is, tenure – with periodic, *de novo* reviews of faculty, eliminating any assurances of long-term professional security.

The question to be asked is whether such alternatives can protect academic freedom and provide adequate professional security for faculty. The answer I would offer is "no."

Maintenance of academic freedom is essential if our colleges and universities are to fulfill their historic functions of testing and developing new ideas, alternatives which add to human knowledge, additions which expand our universe. In the last twenty years, the vastly increased and vastly complex interconnections between our institutions and both government and corporate America mean that threats to academic freedom exist in new and subtle – although more threatening – forms. We see not a direct cut in the institutional budget but a plausible refusal of a major research grant, not the firing of a controversial faculty member but the phasing out of a program.

In this context, the maintenance of academic freedom requires maximum assurances that faculty will not be punished for private behavior, statements made as individuals, or academic judments falling within the broad legitimate boundaries of responsible professional conduct. The maintenance of academic freedom requires, too, that refusals of grants or termination of programs not translate directly into dismissals of individual faculty.

The maintenance of academic freedom is, therefore, indivisible from the maintenance of tenure.

"Alternatives" to tenure typically require recurrent *de novo* decisions on continuing employment, either at the end of a tenure "cycle" or at the time that a multi-year contract is to be renewed. Such *de novo* hearings, by raising once again the original question of on-going employment and thereby challenging the basic assumption of security, inescapably create an environment in which pressures inimical to academic freedom exist. More importantly, the explicit knowledge that one will be reviewed *de novo* within a specified period of time creates an on-going atmosphere of unease. For reasons inevitably tied to professional security, the individual cannot help but feel continuously on guard, again a situation which poses considerable threats to the creative, constructive exercise of academic freedom.

Some alternative systems, such as the system of cyclical tenure at Governors State University in Illinois, have attempted to remedy this dual problem of professional security and academic freedom by specifying that renewal of an individual's tenure "cycle" can be denied only for "cause." Such an alternative then becomes virtually indistinguishable from tenure in that the burden of proof for termination falls upon the university, hardly what the proponents of such alternatives appear to have in mind.

It is necessary to recognize once again that one of the two basic issues involved in discussions of tenure is whether, how, and for what reasons a faculty member whose performance has been accepted as satisfactory over a period of years can be dismissed. Evidence strongly suggests, furthermore, that the desire for reasonable job security embodied in the continuous attempts by faculty to extend and strengthen the still-evolving tenure system is a widely shared human concern and that, moreover, when the response to that concern is an affirmation of reasonable on-going security, increased creativity and productivity result.

In that context, then, I suggest that tenure is the best response developed to the dual question of how to protect academic freedom and insure professional security. Rather than debating whether tenure ought to exist or whether and what alternatives to tenure ought to be considered, I urge acceptance of reality.

The realities appear twofold: tenure needs further elaboration and clarification to become a system capable of protecting academic freedom and providing adequate professional security; moreover, the major arena through which this elaboration and clarification will occur is collective bargaining.

## A Rational Framework

Despite the claims of both the most dedicated opponents and supporters of collective bargaining in higher education, the major effect of collective bargaining is to provide a rational framework within which the historical struggle between faculty and administration can be enacted. Collective bargaining is simply a logical extension of the on-going attempts of faculty to assert a reasonable measure of control over their professional careers, and is additionally the inevitable consequence of increasing institutional interconnections between large-scale government and large-scale corporate institutions on the one hand and institutions of higher education on the other.

Because this is so, collective bargaining provides features which are advantageous to both faculty and administration as a method for clarifying and elaborating tenure.

Most readily apparent is the fact that a collectively bargained contract is by definition mutually agreed upon. Within broad parameters, both sides are organizationally committed to both the existence and enforcement of the contract, since organizational credibility and commitments are entailed. Even more widely accepted, even by many management commentators on the subject, is the fact that a contractual grievance procedure provides an effective and legitimized mechanism for the resolution of disputes over the meaning and implementation of that contract, and for clarifying terms and procedures contained within it.

Collective bargaining is, additionally, a commendable recognition of the realities of faculty employment relations. Individual faculty members can only rarely negotiate with administrators as individuals. The president is not the "first faculty member," but is an administrator attuned to budget-making, fund-raising and politics. The disposition of individual cases of tenure or academic freedoms is in fact determined by collectivities. The overt recognition of that fact which collective bargaining entails promises vastly improved potential for successfully dealing with these complicated issues.

It is not incidental to point out as well that the mechanism of collective bargaining provides ways of achieving administrative compliance with formal policies and procedures. Far too many of the on-going problems in higher education have in fact been caused by administrative failures of one sort or another, and the process of clarifying, specifying and enforcing a contractual agreement affects not only faculty behavior but that of administrators as well.

### Collective Bargaining and Tenure

The process of collective bargaining in higher education thus offers unprecedented opportunities for developing a viable, legitimated, and enforceable tenure system. Through collective bargaining, mutually agreed upon answers to some of the central and most difficult problems related to tenure can be developed. Having such answers in contractual form with enforcement through a contractual grievance procedure will insure maximum compliance with a minimum of institutional conflict.

For example, the definition of "cause" for dismissal can be contractually established, along with procedures for establishing that such "cause" in fact exists. Not only would this eliminate those cases in which an administration attempts to use reasons never accepted as valid by faculty as grounds for dismissal, it would also eliminate conflict over appropriate procedures.

Further, cases in which institutions claim financial exigency or substantial decline in student enrollment can be contractually clarified. Procedures and standards which institutions must follow in attempting to demonstrate such a circumstance can be specified, along with protections and rights for individual faculty members otherwise faced with what appears to be, and what may often be in fact, arbitrary dismissal. Since collective bargaining is a process through which problems can be addressed, it has the additional advantage of being a mechanism for finding solutions to future problems as yet unrecognized .

Such intertwined issues as the conditions of the probationary period, the rights of probationary faculty, and the status of the proliferating number of a "non-tenure track" faculty, both full and part-time, who perform duties identical to "regular, tenure track" faculty, can be defined, with the conflict over these critical issues channeled into the productive framework of collective bargaining.

Of very great importance is the fact that collective bargaining, through defining and guaranteeing rights and procedures in all of these areas, offers at last a viable mechanism for guaranteeing to faculty the due process rights which faculty ought to enjoy as citizens, but far too often find woefully absent in academia.

Most crucial, and most related to our topic, however, is this: collective bargaining offers the framework for the development of a system of tenure which both contains viable guarantees of academic freedom, the foundation upon which higher education must rest, and insures faculty the professional security essential to the health of American higher education.

## 15. THE TENURE SYSTEM—II

Margaret K. Chandler
*Columbia University*

The results of a simple effort told me a great deal about tenure as an issue. In preparing for this talk, I asked professors and administrators from several schools if they knew of a humorous story about tenure that I could use to introduce my remarks. I was amazed that my questioning produced nothing at all. In fact, no one seemed to see a light side to this topic. However, I could detect a great deal of feeling about this issue, feeling which not only blocks out humor but also most attempts at reasoned discussion.

With regard to our topic, alternatives to tenure, our speaker, Margaret Schmid, obviously feels that there is only one alternative, a rationalized version of the present system which would be the result of codifying it in the collective bargaining contract. A better process would emerge, although the reasons for this are not clearly stated. Through negotiation, the parties would set forth specific criteria and procedures. Another compelling benefit was not stressed, namely, that placing tenure systems in the contract asserts the faculty's right to a continuance of this system and affords protection from the onslaughts of those who might seek to introduce a completely different employment relationship.

### Contract References and Current Practice

Contractually specified tenure certainly is popular with unionized faculties which now are found in 30 per cent of the four-year and 50 per cent of the two-year schools. Eighty per cent of the four-year contracts and 65 per cent of the two-year contain language concerning tenure. Our research on faculty contracts contrasted faculty gains in four personnel areas – appointment, nonrenewal, promotion and tenure. The great emphasis the four-year sector unions placed on a voice in tenure matters was reflected in this area's receiving the highest score for contractually specified faculty influence.[1]*

Before critiqueing other alternatives to tenure, it should be noted that the system some are seeking to reform or replace is not a single entity. On a nation-

*Footnotes for this paper appear on p. 113.

wide basis we have nothing like a uniform tenure system. In fact, approximately 15 per cent of our colleges and universities have none. Some have what might be more accurately characterized as a tenure custom, ill-defined and supported largely by tradition. The majority have the full-blown tenure system with a set probationary period, merit-based standards and peer review, but a substantial minority do not.

Thus, one must take care in proclaiming a particular case a real departure from the tenure system. Many so-called departures may never have had tenure in the accepted sense of the term.

## Variations on the Theme

There are two groups of alternatives to tenure. The first involves actual replacement of tenure with another system. A second group retains tenure but modifies its impact on the institution's ability to hire.

The most prominent of the members of the "replacement" group is the "rolling contract." To soften its image, some refer to the system as "term tenure." Under this arrangement, the professor is guaranteed a position for a certain period of time, usually five years. As the contract is renewable, an evaluation takes place as each five year period comes to an end. Small liberal arts colleges without faculty unions have pioneered in this field, e.g., Vassar. Others that have the system are Hampshire College, Evergreen State, Governors State, Curry College and some branches of the University of Texas.

In theory, the system motivates continual high quality academic performance and at the same time provides the administration with ready access to the market. However, if the system also motivates unionization, it can lose its vaunted flexibility if and when the faculty association takes control of the reasons for nonrenewal.

A variation on the above arrangement retains a parallel tenure system with a fixed number of tenure slots. The administration simply renews the contracts of those who meet the performance standards but for whom no tenure slot is available. This program obviously creates a two-class system which may well lead to pressures to abandon tenure altogether.

## The Academic Labor Market

Dworkin and Johnson propose a major, though untested, reform of the academic labor market which they regard as an institution governed by antiquated rules.[2] They recommend a system similar to that employed in professional sports. Professors would act as free agents, negotiating any length contract with any interested institution. A lifetime commitment would be a possibility.

A professor also could make a short-term contract with an option year. If he/she subsequently worked up a deal with another university, the present employer would have the right of first refusal. The authors also note that participants in this new market could arrange inter-institutional trades in which, say, two engineering professors could be swapped for a mathematician and an astronomer! This proposal may have been made partially in jest, but it does point up the blindspots in the present academic labor market.

**Pros and Cons**

Employment arrangements designed to stimulate mobility and flexibility worry even those who seek these characteristics. Tenure systems focus on high quality performance, and while the new plans still hold to this line, they incorporate other values which may become dominant. Thus there are those who question the assumption that tenure is so flawed that it must be abolished. Moreover, they argue that stating the issue as "finding alternatives to tenure" does not deal with the problems the tenure system faces. These problems are left in limbo, while the hastily adopted replacement plans proceed to develop difficulties stemming from flaws in their design. These more conservative critics simply ask, "What aspects of the tenure system cause problems and how can we correct them?"

Reformers of this type have directed their proposals toward two basic problems. One involves maintaining the flow of personnel through the organization. The other concerns the lack of review procedures within the tenure system.

Most talent-based organizations feel that the first problem is very serious because, without new blood, productivity will decline. Early retirement is one way of opening up the system. The Wayne State University Plan is the best known of these efforts. All attempt to make early retirement truly attractive by removing the usual penalties. Full pension and benefits may be paid even at age 60. The early retiree may also receive a cash settlement which increases as the age of retirement drops. This payment, which may be as high as $70,000, serves as a hedge against inflation and as a nest egg which will permit the starting of a new life. As a sizeable portion of all professors have been retiring early, this plan provides further incentives for existing behavior. However, increasing inflation rates and the new federal requirement that permits the mandatory retirement age of 70 pose real threats to the future of plans that depend on the existence of a self-selected population.

Some proposals eliminate the factor of personal choice. One plan would declare tenure slots open when the incumbent reached age 60. He/she would then become a Senior Faculty Member. Income would be maintained, but the tenure line would be vacated , thus making room for a new candidate.[3] Advocates of this plan see a potential for savings because some Seniors might move to other pursuits and positions. Those who remained would continue to serve the institution. Administration is mentioned as one possible Senior activity. Teaching in the school's adult education program is another.

Another set of solutions involves the modification of hiring practices. Young faculty members can be brought in by creating positions not tied to the tenure track: post-doctoral appointments, one year assignments, and adjunct professorships. These practices are becoming widespread and are so well known that they do not require further explanation.

Critics frequently charge that tenure serves to protect dead wood. Those seeking to repair this flaw propose strengthening the evaluation process within the tenure system. Of course, tenure has never been an inviolable status. One can be dismissed for cause, which includes incompetency. However, the procedures for accomplishing this goal are seldom invoked. Some have proposed review procedures at regular intervals after tenure is granted. The faculty association and the administration could be a part of the process, and dismissal would be possible if the review produced negative results. This solution might serve as an incentive for improved performance. Because a negative review is seldom apt to be followed through to actual dismissal, the plan probably would not open up very many tenure slots.

## Conclusion

Both administrators and professors are deeply concerned about the future of the tenure system. However, all faculty members do not want to establish collective bargaining and move tenure into the contract and not all administrators want to abolish it. The assured quality of these two alternatives is not that high. Still, there is no question that the parties are seeking to bring this troubled system in line with their needs.

However, there is no reason to wait for conceptual break-throughs to resolve the problems of the tenure system. There are only a limited number of options, and most of them are being exercised. The parties have been engaged in (1) asserting jurisdiction over the tenure decision, (2) developing alternatives that place the employment relationship on a contractual basis, (3) modifying tenure track entry and exit processes, and (4) installing systematic controls over those who are tenured.

All of these procedures involve their own unique problems. Some create explosive two-class systems. Others invite unwanted responses. A millennium will not result. Still, while some are debating, others are in fact making changes. I believe that the current pressures in our society for more and not less security and either the presence or the threat of collective bargaining will serve to insure that gradual alterations will be more frequent than drastic ones. However, when major changes do take place, their psychological impact will far outstrip their numbers.

I began by stating that tenure is an issue with little accompanying humor. Feelings are intense and so is the rhetoric employed in presenting positions. These facts may well be a forewarning of the difficulties the parties will encounter in making workable adaptations.

## FOOTNOTES

[1] Margaret K. Chandler and Daniel J. Julius, *Faculty vs. Administration: Management Rights Issues in Academic Collective Bargaining.* New York: National Center for the Study of Collective Bargaining in Higher Education, Baruch College, CUNY, 1979.

[2] James Dworkin and Robert Johnson, "A Sporting Alternative to Tenure," *Academe,* Vol. 65, No. 1, Feb. 1979, pp. 41-45.

[3] Charles B. McLane, "The Malaise of Tenure Decisions: A Proposal for Senior Faculty Reassignment at Sixty," *Academe,* Vol. 65, 2, March, 1979, 133-136.

# 16. BARGAINING WITH THE NON-PROFESSIONALS

Don Wasserman

*Director of Research and Collective Bargaining Services, AFSCME*

My early reaction at being invited to speak at this conference has really been confirmed. Academics discussing collective bargaining in universities and colleges are concerned with much more than issues of bread and butter wage bargaining.

In looking for a point of departure, I was struck by several considerations. One is that, as a representative of non-professional college and university employees, I find in the public sector relatively little difference between representing people at college and university campuses and people who work for other agencies in the jurisdiction. I see little difference in terms of aspirations, goals, objectives, what it is that makes people want to join, participate in and administer a union. Limiting my comments to the non-faculty, I see more differences between those in the public sector and those in the non-profits. Even there, the differences are somewhat esoteric.

## Public vs. Private Sector

The differences do not concern themselves so much with aspirations as with how one organizes, how a unit is represented, the form that bargaining takes, and the scope of bargaining. This applies, whether a college or university is non-profit and is covered by the National Labor Relations Act with its units determined in accordance with NLRB rules; or whether the college or university is in the public sector with its units and scope of bargaining covered under a state collective bargaining law as in New York; or whether it exists in no-man's land, as is the case in many states that have no public sector bargaining law.

It seems to me that this difference of public vs. private is much greater, in form at least if not in substance, than the differences between clerical employees, blue-collar workers, para-professionals, etc., who work on the campus or who work, for example, for a State Department of Transportation or any other such agency. As a matter of fact, considering the way bargaining units are arrived at in the public sector under most state bargaining laws, we find rather broad units for non-academic employees which sweep across the state and cover, for example, blue-collar workers without regard to whether they work on a university campus or for a state agency. The same is true of clerical employees.

## Effect on Issues

In a non-profit public institution of higher education, bargaining units are typically cut on a much narrower basis and are occasionally somewhat easier to organize. Let me follow through on that theme. If you have much narrower bargaining units in the private sector than in the public sector, if units are limited to a campus rather than to a state, what you are likely to find is that local issues rather than statewide issues emerge. For instance, when the bargaining unit is cut across the state of Wisconsin, all blue-collar workers in the state, regardless of what campus of the University of Wisconsin they're at, sit down at the same bargaining table and are part of the same bargaining committee as state employees working for the Department of Labor, the Department of Transportation, the Department of Mental Health, etc. There you may find a tendency toward some of the local campus issues being shunted aside in favor of the large global state issues. Issues that are peculiar to the Green Bay campus or the Madison campus must be covered in local supplementary negotiations. They cannot be ignored.

On the other hand, if you're negotiating a contract in the private sector with a university that has only one campus, you are unlikely to get into that multiplicity of levels of bargaining because you are addressing local issues peculiar to the institution while at the same time you're setting the wage levels, the pension benefits, the health insurance, etc., etc.

The only thing that must be guarded against in negotiating a master state contract that also covers colleges and universities is that the peculiar needs of a particular campus are not overlooked simply because you are negotiating terms that may cover 50,000 or 60,000 or 80,000 or 100,000 people located elsewhere.

I think one other distinction is worth noting. It is an important distinction between faculty bargaining and bargaining for blue-collar and white-collar employees. In bargaining for non-faculty personnel, in colleges and universities just as in local or state governments, the people who constitute the bargaining committee are typically much less interested in form than in substance. Bargaining for faculty is a completely different story. Form is likely to be over-emphasized, and if the form of bargaining is not well thought out and well planned, it can end in disaster. I do not want to sound denigrating, but I believe the trappings of bargaining are frequently at least as important as the bargaining itself. I think there is much less tendency in this direction among non-professional blue-collar workers and white-collar workers.

## Public Attitudes

I am sure I have passed over some nuances of difference, but we ought to consider certain more global concerns that I think transcend the issues of bargaining on college campuses for blue collar workers and clerical workers and para-professionals. We have to spend some time and attention on what is happening throughout the public sector today in state and local governments, whether we are talking about colleges and universities, city governments, county governments or local school boards. I think we can say that public employees have never been the darlings of society even though we can remember days when public school teachers certainly had a tremendous amount of sympathy—in the mid-fifties and late fifties and early sixties.

There was also a feeling on the part of the public in general that some degree of unfairness attached to the way public employees, state government employees, were being treated throughout the nation. We had the mass organizing campaigns in the public sector in the sixties, carrying through the early seventies, and then it seems to me that a few things happened. One is that we got caught up in the whole anti-government feeling that began to prevail in this nation, directed initially against elected officials. Back in the early seventies that became quite apparent. Strangely, in some way, the officials were able to grab hold of the issues of anti-government and mistrust in government. They took advantage of a growing concern, especially on the state and local level, about the unfairness of the state local tax systems and revenue-raising procedures. They were able to turn this antipathy in another direction—against the employees who worked for them. A latter day classic example is the California story.

When we talk about the climate of university collective bargaining or bargaining for public employees generally, we cannot afford to overlook this kind of antipathy that the public has for the public sector employee. It's one thing for the Teamsters to take an attitude, if they do, that "the public be damned, we've got enough muscle to secure a contract that's going to protect us over the next number of years, and we can get away with it." It's quite another story for those of us in the public sector or the non-profit sector. Public employees and non-profit employees, whether they're professional or non-professional, are simply not going to achieve equity, reasonableness, or decency in the face of a hostile public.

As I see it, there is much more danger in that kind of climate, long-range damage to the public sector and to our educational system, than there is in not being able to negotiate now a wage increase that matches inflation. With inflation running at 10 percent a year, we're supposed to negotiate wage increases of only 6 and 7 percent. I think that's horrible. I think that's outrageous. But, I also think it's a passing problem, and it pales into insignificance compared to the problem presented by those who want to privatize the government.

Again, if I may use California as an example, it's incomprehensible that a government can be administered in such a fashion that we have in a period of one or two years property tax rates virtually doubling with no adjustments made in the rate of assessment, with people actually paying property tax levies twice what they were paying two years earlier. At the same time, depending on what week you read the newspaper, the state which should be a prime supporter of education, is sitting on a one or a two or a three or a four or a five and then finally a six-plus billion dollar surplus. This is sheer idiocy—idiocy in terms of administering the government. It may make good sense in a presidential campaign, but it is no way to run a grocery store.

### The Economy Drive

As public employees we are caught up in this and in what's happening in Washington. As the debate goes on, the Congressmen and Senators are looking at California because the governors of the nation—not only Brown but other governors as well—are hopping on the balanced-budget bandwagon. And as they do, Washington is telling them: "Sure, we'll balance the budget. The easiest way to balance the federal budget is to take that 85 billion dollars of federal aid to state and local governments and examine it closely. And we'll cut that 85 billion dollar aid package to state and local governments, Mr. Governor, and we'll have a balanced federal budget and you won't have to call a constitutional convention because we can do it ourselves." And so general revenue sharing, which is due to expire the end of next year, is in danger and especially in danger at the state level because they're saying to the governors, "We'll knock the states out of general revenue sharing and we'll continue the local governments under general revenue sharing." Well, you might say that education is not terribly much affected by general revenue sharing. Isn't it? That's free money, and if the state loses a few million dollars in free money it's going to make up that money somewhere.

These questions of the public view toward public employees and the question of how state and local governments and university systems are going to finance themselves are overriding issues. If the institutions that employ our members are not viable, how will we be able to negotiate any kind of reasonableness at the bargaining table, whether we're talking about wages or other economic fringe benefits? These problems may seem somewhat removed from our bargaining tables across the country, but they are really not very far removed at all. In actual fact, they really determine the impact we are going to have in representing employees in the public sector and employees of non-profit institutions.

# 17. PART-TIME FACULTY IN UNIONIZED COLLEGES

David W. Leslie

*Center for the Study of Higher Education, University of Virginia*

There is little doubt that use of part-time (adjunct) faculty has been increasing rapidly among the nation's colleges and universities in recent years. The total is now more than 200,000, and represents about one-third of the academic work force.[1]* A very important jump in use of part-timers occurred beginning in about 1975, and we can project with some confidence that by 1985 nearly 40 percent of all faculty will be less-than-full-time appointments. We cannot pinpoint simple reasons behind this trend, nor are we certain that it will actually persist. Use of part-time faculty is an issue on which there are varying perspectives, points of view which simply cannot be reconciled with facile generalization. In some sectors, use of part-timers is increasing; elsewhere it is decreasing. And within single institutions it is often moving in both directions at once from

---

*The author gratefully acknowledges assistance from the Exxon Education Foundation, which supported research on which this paper is based. Related work by colleagues, Samuel Kellams, Manuel Gunne, Ronald Head, Jane Ikenberry, Janice Wanner, and Elizabeth Lowe has provided substantive background for much of the text. (Footnotes for this paper will be found on p. 126 *et seq.)*

field to field. With some patience and objectivity, the confirming trends can be disentangled, and we shall attempt a detailed explanation elsewhere.

At this point, we can say with some confidence that three major factors underlie the move to part-timers. They are: (1) the declining fiscal health of many institutions; (2) the new academic revolution which accepts a variety of non-traditional premises about who should learn, when, and how; and (3) the professorial marketplace which provides for the distribution of academics across fields and with respect to geography. This paper will explore the implications for unionized institutions, for their faculty, and for the structure of academic labor relations.

## Unit Determinations Affecting Adjuncts

Part-time faculty are almost universally excluded from existing vehicles for the representation of faculty interests in academe. They are not usually organized; they are generally excluded from (or are not effectively represented by) bargaining units of full-time faculty; and traditional governance mechanisms ordinarily neglect the part-timer. There are legal, political, and economic reasons for the situation, and there are, of course, arguments to be heard from all sides. But first a summary of the facts is needed.

The question of an appropriate model for protection of part-time faculty rights and interests has been approached in a confused and inconsistent search for equity. At City University of New York, the initial unit determination in 1969 recognized clear conflicts of interest between full-timers and part-timers. The result was establishment of two separate bargaining units. Later, in 1972, the two units voluntarily merged to form a single comprehensive unit.[2] At the University of Massachusetts some effort was made by the MLRC to draw an appropriate line between those part-timers who belonged in the full-time unit and those who did not. It settled on continuity of service for three consecutive semesters as the criterion, longer service resulting in inclusion.[3] A similar decision was issued in the Los Rios Community College case in California.[4]

Our survey of contracts indicates that 22 percent rely to some extent on continuity of service to decide which part-timers merit inclusion in the full-time unit.[5] Elsewhere, the criterion has been a measure of the level of service. Those part-timers carrying perhaps a half-time (or greater) load would be included, those carrying less would be excluded. About one-third require at least a half-time load.

The NLRB has established a presumption against including part-time faculty in the same unit with full-timers. In *New York University*, the Board ruled that part-timers did not share a mutuality of interest with full-timers because they differed with respect to compensation, participation in governance, eligibility for tenure, and working conditions.[6] The ruling marked a departure from the Board's previous posture on the issue, and it has held fast to *NYU* ever since.

We have found an important difference between the way the public and private sectors treat part-time interests. About 41 percent of all public sector units include at least some part-timers. Just under 29 percent of all private sector units include at least some part-timers. Only 20 percent of all units include all part-timers.[7] Rarely do part-timers form a separate unit with the functional strength to pursue an agreement. Only at Nassau Community College and at Rutgers University have negotiations taken place to the extent that a separate contract either exists or is nearly in place. (We discount the early CUNY movement here because it was absorbed by the full-time unit.)

## Union Attitudes

The faculty unions present an inconsistent front on the issue of representing part-timers. The AAUP whether it represents part-timers in specific bargaining units or not has gone on record several times to point out the advantages of employing some faculty on a part-time basis. Reasoning that some academics want to pursue the dual roles and competing responsibilities of family and career, the Association in 1971 explored creation of "full-status" part-time positions.[8] More recently, the Association's executive secretary has advocated experimentation with phased-in retirement using stepped down workloads and the sharing of positions by husband-wife teams to free lines for junior faculty.[9] In 1975, the Association began a systematic consideration of the status of part-time faculty, and continues to examine the basic questions. A sub-committee report to the 1977 annual meeting recommended essentially that part-timers be eligible for tenure, salary, and benefits on a pro-rated basis.[10] The report also recommended that part-timers be subject to the Association's up-or-out rule. At this writing, with respect to any official position to be taken by the Association the matter evidently rests unresolved with a subcommittee of Committee A.[11]

The National Education Association recently labeled use of part-timers "a major problem for full-time faculty in higher education."[12] The NEA report noted that part-timers can be used to exclude career professionals from available positions, and that part-timers' ability to work outside the framework of collective bargaining units and professional certification processes makes them "a corps of unregulated personnel" that can be exploited "by unscrupulous administrators and boards of trustees."[13] The NEA argues that non-union labor will work for lower wages, thus undercutting gains made by the union for its members. It favors raising part-time wages to pro-rated full-time equivalent rates, and for employing a single full-time instructor whenever part-timers' assignments can feasibly be combined.

The American Federation of Teachers has also considered the part-time faculty question, and passed a resolution opposing the escalating use of part-timers at its 1977 annual meeting.[14] Central to the AFT position is the assumption that part-timers undercut financial security and laboriously won rights to seniority, peer review, and due process for full-time faculty.

All three national unions reflect a concern over the assurance of quality performance by part-time faculty. While subject to summary, and usually automatic, dismissal via non-renewal of their contracts, part-timers are also almost universally (more than 93 percent) non-tenure track appointments.[15] This leaves them free from the customary "up-or-out" judgment full-timers must face. Merely adequate performance from semester to semester is a different – lower, some would argue – standard than junior full-time faculty must meet. Thus, the AAUP position expresses concern over whether part-timers are properly evaluated with respect to the profession's traditional standards of excellence.

In a key campaign for support of about 18,000 faculty in the California State University and Colleges system, two unions differ substantially in their positions on part-timers.[16] The more conservative organization is the Congress of Faculty Associations, an affiliate of both the NEA and the AAUP. CFA has "never recruited part-time faculty members," according to its president, who also asserts that "the guts of the university is full-time faculty." Taking a more activist posture, the United Professors of California, an AFT affiliate, has, according to its president:

1. sought to include all part-time and temporary full-time faculty in the CSUC faculty bargaining unit;

2. sponsored legislation securing grievance rights for part-time and temporary faculty;

3. worked to remove limits on temporary faculty continuity.[17]

Specifically on the issue of part-timers, the UPC seeks to limit their use on a system-wide basis as a way of creating more tenure track lines. But it promises simultaneously to establish economic and professional security for those who remain in non-track positions.

These positions are logically consistent with one another. The major unions seek essentially to reduce the differences between rates of pay, access to benefits, provisions for employment security, and other substantive rights accruing respectively to part- and full-time faculty. This will *both* reduce incentives on the part of the institution to use part-timers and enhance the dignity, security and rewards of those who work less than full-time. With reduced numbers and enhanced rewards, competition for the positions would increase and quality control would be assured or strengthened. In simple terms, it appears to us that the unions want as much control as possible over part-time faculty employment.

### Contract Patterns

Existing contracts which we have surveyed and analyzed in depth provide some measure of protection for part-timers' interests. But our guess is that the words, "collective bargaining," ring hollow for most part-timers at institutions with full-time faculty contracts. First, as noted earlier, only 20 percent of all contracts cover all full- and part-time faculty in existing units.[18] Most contracts (62 percent) are worded to exclude the majority or even all part-timers from coverage. Workload or term of service restrictions effectively place unit membership out of reach for the part-timer whose work profile does not closely resemble that of the full-time academic.

In a substantial fraction (38 percent) of the contracts we have examined, clauses appear that explicitly or implicitly restrain the use of part-time faculty. They specify how much of the total workload may be carried by part-timers, establish a system of priorities in faculty assignment that assumes full-time faculty security, or establish minimum academic qualifications for part-timers. Part-timers are generally excluded from eligibility for tenure, and are afforded minimal due process rights. Further, they are frequently left vulnerable to bumping by full-timers.

Compensation clauses seem in substantial numbers to have spoken to the issue of pro-rating pay and benefits. Almost one-third do so in the case of salary (as opposed to just over 20 percent among all colleges, unionized or non-unionized). Over one-half of all contracts (56 percent) provide part-timers with at least some benefits. Many provide group medical and life insurance plans. Retirement plans, however, generally remain out of reach for part-timers in existing contracts. Pro-rating of leave time and of contributions to insurance plans is common.

The logic of the unions' position on part-timers is thus borne out in the contracts they negotiate. To the extent possible, use of part-timers is controlled and minimized. On the other hand, the interests of "quasi-full-timers" are pursued and defended. Existing contracts screen out the largest number of part-timers, but make important protective gestures toward those who are likely to be committed and persistent in their academic work.

## Strained Relationships

Relations between full-time and part-time faculty tend to be strained. When both are included in a single bargaining unit, there is an evident distrust between the two groups. Experience on a variety of campuses seems to show rather effectively that comprehensive bargaining units do not work well.[19] The interests of part- and full-time faculty are substantially different, are often in conflict, and the single unit approach merely pits them against one another in an internecine power struggle.

Part-timers must almost always lose such a struggle for two reasons. First, they almost always have smaller numbers. And second, they are usually a fragmented and terribly insecure group. Compounding their lack of natural coalescence is the tremendous diversity of part-time faculty characteristics and interests. Tuckman's survey divided them into seven discrete groups, some of whom teach for economic reasons, but many of whom do not.[20]

Our own case study research confirms the variance among part-timers. Some are struggling academics who piece together a semblance of a full-time job out of three or four part-time ones. Some are highly paid attorneys or accountants who teach out of a sense of community obligation. Some are housewives seeking adult intellectual stimulation. Some are retired persons pursuing a life-long interest, or a second career. Most have little involvement in campus life, and are not vitally interested in the goals and objectives of organized faculty associations.

To the extent that anyone tries to speak for the part-timer, it is for a multitude of divergent interests that he or she must speak. We have rarely observed a collective bargaining unit effectively organized to represent part-timers. The natural interest and inclination of faculty units is to secure a solid position for full-timers first.

## Economics of Part-Time Employment

Are part-time faculty cheap labor? Certainly they are perceived as such, and, whatever else is said, faculty unions loathe the availability and use of such labor in place of full-time faculty. Two issues need to be addressed in achieving some perspective on the question. First, how much work of what kind do part-timers perform? And, second, what are the market rates for that kind of employment?

The crucial point in any arguments to be developed here is that part-time faculty teach. They do trivial amounts of the other work that comprises a normal faculty workload.[21] What we find in general is that part-timers are used most heavily in the emerging non-traditional areas of instruction.[22] Correspondingly, their use is *declining* in areas considered the preserve of full-time faculty. In graduate instruction, and in summer programs, part-time employment is falling off. The institutions are plainly trying to preserve the workloads of full-time faculty as a first priority, and they are intent on retaining the stable core of dedicated academicians whose consuming involvement in advancing knowledge and practice in the disciplines and professions requires long-term effort. Part-timers, by the nature of their segmented involvement, cannot be full members of the academic community as the term applies to established graduate departments.

Because part-timers teach but do not typically assume other functions, they are most heavily used by enrollment-driven colleges. If there is a way to attract more students by offering new courses or by using unusual schedules and/or formats, enrollment-driven colleges may try to capitalize on the opportunity by hiring part-timers. Such expansive and adaptive moves seem to be resulting in an increasingly part-time student body for many institutions. The number of part-time students increased one percent between 1977 and 1978,[23] just as the number of full-time students fell by a nearly equivalent percentage and our statistics show a substantial correlation ($r = .61, p < .01$) between the percentage of part-time students and the percentage of part-time faculty in a random sample of 161 institutions. Accordingly, we can see the connection between efforts to adapt in a softening market and the increasing use of part-timers.

It should be added that the part-time booms are occurring at other than the major universities; the community colleges and small, struggling private colleges seem in the forefront. Building enrollment on a course-by-course basis leads to part-timers, both students and faculty. Doing research which attracts grant support and maintaining a graduate program lead institutions to emphasize the sustenance and security of established full-time faculty.

## Compensation of Part-Timers

So, no matter how low the wages for part-timers could be depressed relative to full-timers' wages, there are some institutions for which part-time faculty are irrelevant—or, at best, only marginally useful. (Ironically, it seems to be at just those institutions where wages for part-timers are highest!) They are most valuable, and less well paid, where teaching is the lifeblood of the institution. Variance in wages is great. Our data show a range from about $200 per three-credit course to more than $3,000 for what is the same amount of work on paper. On the average, we find wages to be about $875 per course (Tuckman reports about $1,000), $275 per credit-hour, or about $14.30 per contact-hour.[24] The large majority of part-timers are probably getting between $600 and $1,200 per course.

Two important caveats should accompany any consideration of part-time compensation. First, most part-timers cost nothing in the provision of benefits; they receive none. Second, although we have no systematic data on the issue, it is evident that full-timers' compensation increases more rapidly over time. In fact, increases in the part-time scale appear to have been uncommon in recent years.

Calculating the relative wages of part- and full-time faculty requires a complex accounting design, and no conceptually adequate attack has been completed at this writing. Suppose, however, that a faculty member earns $18,000 a year. At a community college where 15 hours per semester is the normal load, and where that is accounted as 90 percent of the work assigned to the faculty member, the cost per semester hour is $540. At a research university where nine hours per semester is the normal load, and where that is accounted as 70 percent of the work assigned to the $18,000 per year faculty member, the cost per semester hour is $700. Add 15 percent for fringes to these figures, and they become $621 and $805 respectively. Part-timers get $200 to $400 per semester hour in general, although they might get as much as $1,000 per semester hour or as little as $70.

### Hidden Costs

On the surface, it thus appears that part-timers are in fact very cheap labor, working for wages far below scale. But Tuckman points out that adjusting for faculty rank brings the figures much closer together.[25] Put another way, part-timers tend not to replace the $18,000 per year average faculty member. They are more likely interchangeable (as to qualifications and assignment) with graduate teaching assistants or instructors, for whom the average wage is closer to $12,700.[26] Using the same assumptions about workload as before, cost per semester hour for full-timers falls to $381 ($438, corrected for fringes) and $494 ($568, corrected) respectively. Part-timers probably remain cheaper to hire in many locations, but local market conditions will have an impact, and the administrative overhead of managing the constantly shifting pool of part-timers is not factored in. Mathematicians, for example, might be in extremely short supply, driving their wages up, while social scientists may be abundant.

Because individual bargaining is the rule, such supply-and-demand differences tend to be accommodated within institutions. Coupled with the fact of widely varying needs for financial support among part-timers (some of whom may not be legally able to accept any compensation), the market assures departure from any generally useful average figure. It is also generally true that using part-timers in any significant numbers shifts a heavier burden of student advising and program coordination onto full-time faculty. If those hidden costs plus other administrative costs are transferred so that they count against part-time wages, the gap will narrow somewhat.

If these calculations lead to confusion, let us hasten to assert that neither equivocation nor obfuscation is intended. Part-timers do evidently provide instructional services alone at a substantially lower average wage than full-timers do. The generalization holds across types of institution, and cost savings of employing large numbers of part-timers can be very substantial indeed .

**Academic Considerations**

But cost is not necessarily uppermost among the factors that determine the employment mix at most institutions. It becomes a marginal consideration when academic factors can be held constant. The "product" of academic institutions depends upon departmental and program structure. There is little doubt that academic objectives are most effectively served by relying on full-time faculty. The teaching and learning process engages the continuous involvement of faculty and students alike. Most academics we have interviewed in the course of our project would far prefer to structure their programs around full-time faculty exclusively.[27] The basic issue in using part-timers seems not so much to be whether cost savings can be achieved, but whether an acceptably cost-effective solution to academic productivity can be achieved.

The answer to this question seems really to vary from department to department, even within the same institution. For example, virtually no music department can provide the range of required instrumental specialists with full-time faculty. They must hire part-time instructors. Departments that must manage large cyclical swings in enrollment from term to term may likewise find that the use of part-timers (if a sufficient number with appropriate qualifications can be located) helps keep section sizes low and preserves a stable and orderly workload for full-timers.

For all types of institutions, location in a rich manpower market permits the staffing of new specialties with highly skilled professionals. Broadcasting in New York, international economics in Washington, and vending machine technology in an urban area where it is a thriving business are some illustrations. Not to be denied is the use of part-timers for low-status courses. Literary scholars would not like to be saddled with conversational Russian. Mathematicians are impatient with high school level algebra students. But part-time faculty, with teaching rather than scholarly interests, accept the challenge readily. Rural institutions find it difficult to attract and hold full-time faculty with the right mix of skills. They can staff more effectively by hiring local teachers and other professionals part-time.

In sum, many individual departments provide a more effective instructional program because they are able to use part-timers. They could not do what they are now doing because the relevant skills would not be available in full-time people at any price within their grasp. This is an important point. Academic salaries have been losing ground in recent years. Competing markets for top people in at least some fields may begin to drive faculty (and potential faculty) out of the academic work force. Colleges and universities cannot, even now, afford to attract the best and the brightest in fields like law, business, medicine, engineering, and computer science. The only way a department can hope to tap into cutting-edge people in many fields is to attract them to visiting or part-time positions.

It is not far-fetched to suggest that economic stringency will ultimately force such fundamental changes that academic institutions will become essentially brokers rather than repositories of knowledge and expertise. Such a vision is firmly in place at a small, but growing, number of experimental institutions which use *no permanent faculty at all.* Both the Community College of Vermont and John F. Kennedy University near San Francisco, as well as the better-known Empire State College of New York, provide all instruction via part-time faculty. This is not the place to explore the implications of this development, but we should point out that universities in many other nations are also staffed for instruction primarily by professional people who are fully employed outside the university. Experience may yet teach us that it is both academically feasible and economically essential to provide quality instructional programs by relying on part-time faculty.

But we caution that the model does not account for the preservation of other vital university functions. Intensive socialization, whether professional or purely maturational, and continuous basic research probably cannot be accomplished effectively by such brokerage. If these are truly part of the American academic experience – and they are in some places but not at others – then use of part-time faculty will continue to be a marginal choice for what we know as core institutions.

## Conclusions

We conclude that the fundamental question is what kind of academic community we ultimately want. Our findings concerning some basic issues, working backward, are as follows:

1. Many institutions will turn to part-time faculty for bona fide academic reasons as the organization of higher education changes in character. Cultural, social, educational, and economic forces will induce serious efforts to achieve new adaptations, of which part-time faculty use is clearly one.

2. Part-timers will provide a cost-effective solution to some, but not all, economic problems faced by colleges and universities. Part-timers do permit direct cost savings, and can be useful in balancing strapped budgets. But many programs in most institutions show a clear preference for organizing to provide their offerings with full-time faculty.

3. Use of part-time faculty provides a margin of security for full-time positions in many institutions, but they have been used to supplant full-timers elsewhere.

4. Labor relations with part-timers has become a divisive problem. The interests of part- and full-time faculty conflict. Part-timers do not fit easily into bargaining units of full-timers. Ambivalence characterizes relationships on all sides. Labor boards and unions alike take positions that may be substantially inconsistent across cases.

We are left with our basic questions. There will be, we think, no foreseeable diminution in the use of part-timers. Nor will there be any functional coalescence of interest among their growing numbers. Some part-timers need the protection and benefits of union representation, but most are probably indifferent at best. This bodes ill for the vitality of any moves to separate units for part-timers.

There will likely be several solutions to the part-time problem, rather than one. Some will naturally coalesce under the shelter of full-time units. Others will form their own legitimately separate units. And the remainder will continue with the traditional disorganized individual bargaining. None of these vehicles provides the part-timer with any particular degree of safety or security. For they simply work outside the political, economic, and academic structure of traditional college and university organization. There is not much evidence to suggest any real changes in existing realities.

## FOOTNOTES

[1] D. Leslie. The Part-Time Faculty Labor Force. In D. Leslie (ed.), *Employing Part-Time Faculty.* San Francisco: Jossey-Bass, Inc., 1978, p. 6.

[2] R. Carr and D. Van Eyck. *Collective Bargaining Comes to the Campus.* Washington, D.C.: American Council on Education, 1973, pp. 80-82.

[3] *In the matter of the Board of Trustees of University of Massachusetts*, Cases No. SCR 2079, SCR 2082, Labor Relations Commission, Commonwealth of Massachusetts, October 15, 1976.

[4] *Los Rios Community College District*, Case No. S-R-438, 1 PERC 185 (EERB, 1977).

[5] The complete results of this survey are reported in D.J. Ikenberry, *A Descriptive Study of Contract Provisions Affecting Part-Time Faculty Included in the Bargaining Unit at Post-Secondary Institutions.* Unpublished Ed.D. Dissertation, University of Virginia, 1978.

[6] *New York University*, 205 NLRB No. 16 (1973).

[7] See Ikenberry, *supra*, note 5.

[8] Report of Committee W, 1970-71. 57 *AAUP Bulletin* 215, 217-218 (Summer, 1971).

[9] M. Baratz, "Making Room for Junior Scholars," 12 *Academe* 1 (June 1978).

[10] Report of Committee W, 1976-77. 63 *AAUP Bulletin* 141, 142-143 (August 1977).

[11] Report of Committee W, 1977-78. 64 *AAUP Bulletin* 177, 180 (September 1978).

[12] Report of the N.E.A. Committee on Substitute, Part-Time, and Paraprofessional Personnel. Washington, D.C.: National Education Association, 1976, p. 105.

[13] *Id.*

[14] J. Magarrell, "Increasing Use of Part-Timers Condemned by Teachers' Union," *The Chronicle of Higher Education*, September 6, 1977, p. 4.

[15] This figure is derived from an unofficial summary of 1975 data gathered, using the EEO-6 form by the Equal Employment Opportunities Commission.

[16] B. Watkins, "Two Faculty Unions Vie for Support in California," *The Chronicle of Higher Education*, July 31, 1978, pp. 3-4.

[17] Personal correspondence with Warren Kessler, February 14, 1979.

[18] Ikenberry, *supra*, note 5. Data on contract content presented *infra* are taken from Ikenberry.

[19] As yet unpublished data from interviews conducted at 18 institutions, six of which are at one stage or another of collective bargaining with their faculty, form the basis for these generalizations.

[20] H. Tuckman, *"Who is Part-Time in Academe?,"* 64 *AAUP Bulletin* 305 (December 1978).

[21] S. Kellams and K. Kyre, "Part-Time Faculty in Four-Year Colleges and Universities," in D. Leslie (ed.), *Employing Part-Time Faculty.* San Francisco: Jossey-Bass, Inc., 1978.

[22] The unpublished results of a survey of a small but representative sample of colleges and universities establishes this trend.

[23] "Overall College Enrollment Down Slightly, Survey Shows," *The Chronicle of Higher Education,* March 5, 1979, p. 12.

[24] H. Tuckman and W. Vogler, "The 'Part' in Part-Time Wages," 64 *AAUP Bulletin* 70 (May 1978).

[25] *Idem.*

[26] Report on the Annual Survey of Faculty Compensation, 1977-78. 64 *AAUP Bulletin* 193, 197 (September 1978).

[27] See note 19, *supra.*

# 18. ADJUNCTS—FRIEND OR FOE OF FACULTY UNIONIZATION?

Karen R. Schermerhorn

*President, Faculty Federation of Community College of Philadelphia, AFT*

The local of which I am co-president has had some experience in organizing our adjuncts over the past four years. In 1975, the full-time, union contract faculty voted to petition to include in the full-time bargaining unit all part-time teachers and all "visiting lecturers." At Community College of Philadelphia, a visiting lecturer is a full-time, so-called temporary teacher; many have been working at the College for three, four, five, or six years. The Pennsylvania Labor Relations Board's first decision in 1976 was to include only the visiting lecturers in the full-time faculty bargaining unit; the part-time teachers were granted no bargaining rights at all.

In 1976, the union appealed the decision and after new hearings in 1977 won a reversal in June, 1978, so that the visiting lecturers and part-time teachers were to be placed in a separate part-time teacher/visiting lecturer unit. The union won the representation election in December 1978 by a vote of 111-5. However, the College administration refuses to negotiate and says it will continue to appeal to the highest courts. The part-time teachers and visiting lecturers are now considering a recognition strike.

It is with this perspective that I respond to the three questions that serve as a framework for this discussion.

### 1. The "Cheap Labor" Issue

*Do part-timers represent a "cheap labor" answer to economic stringency?*

My answer is "No," for I do not believe that a new, less expensive work arrangement can be the answer to an economic problem unless this new work arrangement achieves results at least as good as the more expensive one. And there is plenty of evidence, from my experience, that it does not. First, I must dispel the thought that the part-timers are somehow less adequate as teachers and scholars; in fact, with the job market now so competitive, we have noticed at Community College of Philadelphia a higher level of qualification among our adjunct faculty than exists among our full-time faculty.

The real reason that part-time teachers are not the answer is that administrators, trying to get something for nothing, or for less, set up a sub-class of faculty. I want to emphasize that the initial evil occurs when administrators do not treat part-timers equally in the first place. The most glaring inequity is the very low rate of pay and non-existent, or minimal fringe benefits. Setting the part-time teachers even further apart from their full-time colleagues are the sub-standard conditions under which they are asked to work.

Before I explain further just how a sub-class of teachers cannot achieve the same educational results simply *because* they are a sub-class, it is important to note here that other full-time faculty often wittingly or unwittingly play a role in ostracizing part-time teachers. Unless full-time teachers are alert and politically conscious, they may accept the administration's definitions of the personnel situation and then begin complaining about "inadequate part-timers" without realizing that, as the administration itself has set up the employment situation, good teaching is difficult or next to impossible.

#### Working Conditions

Let us think very concretely for a minute about how the conditions of the part-time "sub-class" work against good teaching:

(1) Teachers who are not given regular information about department matters will not appear knowledgeable to full-time colleagues and will be less well equipped to grade papers (because department standards are not clear) or to help students with problems (such as what course to take next).

(2) Teachers who are not invited to attend, speak, or vote at department meetings will remain invisible to full-time colleagues and, again, be less knowledgeable and less able to help students.

(3) Teachers who are not allowed to be members of department or college committees may later be accused by administrators and full-time faculty of lacking "commitment" to the institution. They will be less knowledgeable and less able to help students.

(4) Teachers who learn what courses they will be teaching only at the last moment may well gain the reputation among full-time teachers of being disorganized and unprepared, and cannot give their students their best when they cannot plan their courses ahead of time and must use texts ordered by others.

(5) Teachers who are never sure whether they will be teaching the next semester cannot give their students the benefit of "Incomplete" grades and the additional help and time to complete their course work.

(6) Part-time teachers who are not given offices or telephones may later be accused by full-timers of "coming in just to teach their classes, and then leaving." Without offices, they cannot give their students individual attention, or be reached by phone, or between class sessions.

I could mention many additional examples, including how effectively anyone would teach if he were continually bombarded with reminders of his belonging to a group by definition inferior, or if he were continually worrying about where the next rent payment was coming from. My point is simply that the creation of a part-time sub-class works against good teaching and therefore cannot be an "answer" to any educational budget problem.

## Current Educational Situation

What is the "answer"? In thinking about my own educational experiences as preparation for this conference, I remembered back to the 1950's, the "Sputnik" era. There was a different attitude toward education then, when I was in high school and college: the United States had to produce well-educated young adults to keep our country competitive with Russia. Additional funds were poured into colleges and into student aid. To me, the real problem today is a lack of urgency about our efforts in higher education; it has become a lower national priority. Not enough money is being spent on it; new full-time tenured positions are not being opened; existent full-time positions are being turned into part-time positions; new part-time positions are being created.

I question the explanation, given by some, that the reason for the great number of unemployed or underemployed teachers is a drop in enrollment. First, I know many part-time teachers who are teaching three or four courses at a part-time rate at two, three, or four colleges: the *work* is there. It is the *jobs*, the positions that are not being opened . Second, although it is true that the number of 18-22 year olds is less than it once was, other groups of students, for example, women and older students, are returning in increasing numbers, especially on a part-time basis. There are other untapped student populations – e.g., workers and members of labor unions. I believe the smaller number of students in the 18-22 year old group is being used as an excuse not to open new teaching positions, while other sources of students remain unexplored.

In fact, at some colleges, like my own, which, with a budget surplus, has no economic need to hire part-timers, and which has experienced no drop in enrollment, part-time teachers are being used by administrators for a reason not even suggested by the questions I am here today to answer: that reason is, to break our union. Back in 1970. when we organized our local, we did not insist on including the part-time teachers at the college in our full-time faculty bargaining unit. Since then, the full-time faculty has grown from about 180 in 1970 to 333 today, an 85 percent increase; the unorganized part-time faculty has jumped from 86 in 1970 to 425 today, a 394 percent increase.

Because the College has created new part-time positions outside the bargaining unit, our local has grown to represent a smaller and smaller percentage of the faculty. It is clear that no union can survive with strength if it represents fewer and fewer of the workers at the work place. I believe all faculty bargaining agents will need to organize their adjunct staff–indeed, all their instructional staff–if they are to remain viable locals.

## 2. Organizational Issues

*Is separate organization by adjuncts inevitable?*

The way this question is phrased suggests that, somehow, the organization by adjuncts is a distinct and separable problem that can be dealt with on its own. No–it is bound up with the health of every full-time faculty bargaining unit. The question also suggests that it is equally acceptable if adjuncts organize or if they do not.

I do not agree, and thus I would have to answer the question, "Yes, I would certainly hope adjuncts organize," for unless adjuncts and full-time teachers organize and cooperate, full-timers will lose many of their contract gains and be unable to win others.

Let me give you two examples, one from the instructional area and one related to salaries.

First, our faculty bargaining unit contract states that a teacher shall have the right to choose his instructional materials. For the past few years, our provost has been encouraging the use of educational objectives and has been encouraging teachers to come up with programmed media packages of their own. The pressure to conform by adopting this method has been strong, and especially so on part-timers and on visiting lecturers, who must be rehired again each semester and are not protected by contract from arbitrary dismissal. The existence of an unprotected sub-class working side by side with those protected by contract has led full-timers to question their own basic right to continue to teach as they choose.

Second, there is an obvious impact on faculty salaries and overload rates of teachers who work for one-third the salary of full-timers–or less. As I ask my own colleagues, "Why would the administration be willing to negotiate a higher overload and summer rate for you, when over four hundred part-timers are available at the lower rate?"

Another reason for adjunct organizing, besides protection of full-time contract gains, is the maintenance of the working conditions of the profession. You may have read the article on part-time teachers in the *Wall Street Journal* on March 13, 1979, which reported that poor working conditions among part-timers were responsible for large numbers of highly trained teachers leaving the profession. A third reason for adjunct organizing is, of course, the students. Many adjunct faculty are assigned to teach introductory level and remedial courses. Because of their disadvantageous position as a sub-class, they are the least likely among the faculty to have the knowledge about the College necessary to advise these students. They are also the least likely to be able to plan their courses ahead of time and to be able to follow up the completion of course work into the next semester.

## 3. Current Bargaining Approaches

*How is the issue dealt with in current bargaining?*

There are several different models for dealing with this issue in bargaining. I am most familiar with Moore College of Art, in Philadelphia, where part-timers are covered by a union contract, and with the situation at Community College of Philadelphia.

Let me stress that the prerequisite for any relationship with adjuncts is respect born of mutual recognition of the other's worth and importance. For example, at Moore College of Art, where it is respectable to teach part-time because one's work in the arts is more important, part-timers have won *pro rata* pay and are fully integrated into the union. However, it is difficult for some union-contract faculty at Community College of Philadelphia not to perceive the more recently hired adjuncts as unwelcome intruders into their private domain, or adjuncts organizing into a union as a threat to future full-time faculty salary increases.

What these faculty fail to see is that, once an institution initiates the process of hiring large numbers of adjuncts, the definition of the "institution" changes. The private domain exists no more, except in the minds of some faculty who persist in defining their departments as their unionized colleagues; meanwhile, what really matters is that the work of the institution is carried out by the total group of teachers. And because the administration has changed the definition of the institution, far from part-time teachers "threatening" future salary increases, union-contract faculty who have had to rely on strikes to win their contracts will now find that, unless they ally themselves with the new group, their bargaining strength will be sharply diminished and any salary increase may be in doubt. If antagonisms are not resolved, lack of cooperation between the two groups can make effective bargaining impossible.

What has happened to some faculty at Community College of Philadelphia is that they have internalized the administrative classifications (union contract faculty; adjunct faculty). It sometimes takes years to break down these barriers, until union-contract faculty come to realize that the adjuncts are very much like themselves, in background, goals, and love for teaching, and differ from themselves very little, often only in being younger and/or in having left graduate school and entered the job market later,

On the question of whether adjuncts should be organized into the same bargaining unit as already unionized faculty, or into a separate unit, I believe either way can work if mutual respect and cooperation are present. The adjuncts at Community College of Philadelphia have been placed in a separate bargaining units by the Pennsylvania Labor Relations Board, despite our having made an internal decision to petition that adjuncts be added to the original full-time faculty unit. Cooperative negotiations are a matter of discussion in our own local right now, and we hope to achieve this goal by 1980, since the full-time contract expires then and the part-time unit does not yet have a contract.

## Seeking Accommodation

Some matters affecting adjuncts can be handled in bargaining for a full-time faculty contract. By and large, these contract clauses are those that force the creation of full-time bargaining unit positions or full-time non-bargaining unit positions. One example is a definition of part-time work. With a definition of part-time such as ours, less than nine credit hours, we can get the college to pay a proportional part of the full-time union contract minimum salary to anyone teaching nine credit hours or more.

Another example, from our 1975-76 negotiations, is our 75:25 provision, which mandates that at least 75 per cent of the sections be taught by full-time teachers, whether union contract or temporary; the remainder can be taught by part-time teachers. A potential problem with a provision like this is its initial implementation. It is here that full-time/part-time dialogue and cooperation are essential. When our full-time bargaining unit made this proposal in our 1975-76 negotiations, we wanted to increase the number of full-time positions; we knew our part-time organizing committee wanted more full-time positions, also, for many of them wanted the full-time jobs that would be created. However, the full-timers did not see at first the problem that would have been created by any initial drastic cut in the number of part-time teachers: many part-timers, whether they had other full-time jobs or not, depended on their part-time income, and the union's success in winning this clause might have hurt the very workers we were trying to organize. After many discussions, full-timers and part-timers came to an agreement that the initial implementation would be by attrition in the part-time group over the next few semesters. When each unit was made aware of the needs of the other, we were able to work out a plan towards accommodation.

## Responsibility of the Part-Timers

Of course, even though support from unionized faculty is essential, adjuncts must take the major responsibility for improving their situation. Even before contract negotiations, they can insist on assuming their pro-rated share of faculty responsibilities such as committee work, student advising, attendance and voting at faculty meetings, and office hours. They must erase the distinctions set up by administrators to rationalize putting them into a sub-class. Adjuncts at Community College of Philadelphia report a great increase in morale just from becoming more a part of the college.

In contract negotiations themselves, most important clauses to the adjuncts at Community College of Philadelphia are those relating to job security, not to salary or fringe benefits. They want to be assured of rehiring by seniority and without favoritism. This is especially true of the members of our Organizing Committee, who have all been harassed to a lesser or greater extent on account of their work for the union. Other part-time proposals include:

- pro-rated salary;
- pro-rated fringe benefits;
- notification of their teaching schedules one month before classes begin;
- automatic promotion to, or at least first consideration for, full-time openings;
- termination only for cause, with the right to due process procedures; and
- the hiring of new part-time teachers with the same procedures used for hiring full-time teachers.

Just as part-timers can benefit by some clauses in the full-time contract, so will full-timers benefit directly from part-time negotiations. For example, at Community College of Philadelphia, the full-time overload and summer rate has traditionally been tied to the part-time salary per credit-hour. An increase in part-time salary could well help boost the full-time rate. Even more significant, if part-time teachers achieve *pro rata* pay, it would be a lot easier for full-timers to win the right to teach part-time at a pro-rated proportion of their own salary, an alternative many of us would choose from time to time if it were available. Also, if part-timers achieve credit for their seniority, full-timers could more easily win adjustment of their seniority dates to give them credit for their work as part-timers before they were hired full time. All unionized faculty must become aware of the problems of adjunct faculty. Full-timers especially need to realize that all of us faculty are in the same boat, and that an injury to one is an injury to all. Unless adjuncts organize, unionized full-timers will not be able to maintain their own gains, and, of course, adjuncts need to organize to bring their pay and working conditions up to the level of those of their full-time colleagues. Only then will we achieve the best conditions for teaching our students.

To answer the general question, then, "Friend or Foe?", I must respond: full-timers had better make adjuncts their friends if they want to continue as effective collective bargaining agents.

# 19. LEGISLATIVE LANDMARKS—I

Robert Chanin

*General Counsel and Deputy Secretary, National Education Association*

My field is public sector labor law and I have agreed to discuss some of the major issues that now confront us in public sector collective bargaining. There are, of course, many issues, but I shall address two of them, resolution of collective bargaining impasse and union security, which are certainly high on the list of priorities, and are particularly relevant in higher education collective bargaining. As to each, I shall give a brief background, some indication of where we stand, and where we seem to be going. Before turning to substance, however, I would like to make a preliminary observation to put my remarks in the proper context.

## Significance of the Issues

Higher education collective bargaining is a relatively recent phenomenon. Most of the activity in public education bargaining for the last decade or fifteen years has been at the elementary-secondary level. As a result, many of the examples and references that I give will be drawn from elementary-secondary and higher education, which certainly warrant caution in drawing analogies, but the points that I make do have application at all levels of public education and

132

indeed to all segments of the public sector work force. There is no doubt that the way issues of impasse resolution and union security are ultimately resolved will significantly shape the future of collective bargaining in the entire public sector field, and that includes higher education as well as elementary-secondary.

The problem of how to resolve collective bargaining impasse has been of major concern since we entered this field in the middle sixties. At that time, the few statutes that existed provided a two-level process for impasse resolution. The first was some type of mediation. If that didn't resolve the dispute, things moved to a more structured phase which was variously referred to either as advisory arbitration or fact-finding with recommendations. Both of those are probably misnomers. Advisory arbitration is internally inconsistent because the word arbitration means a process with a binding decision at the conclusion. Fact-finding is also wrong because no one is really interested in the facts; all we ever care about are the recommendations made by the panel or fact-finder to resolve the dispute.

### The Ban on Strikes

Now if those procedures failed to resolve the impasse, the public employees, the teachers, had an option. They could accept the last offer given to them by the school board or they could strike. The problem with the latter option in the 1960's was that a strike by public school teachers probably would have been held illegal in every jurisdiction in the country, either by constitutional prohibition, statutory prohibition, or on the basis of common law doctrine. Even those states that enacted the most liberal statutes for the protection of concerted activity by public employees almost invariably had an express prohibition against the right to strike.

In the late 1960's and early 1970's, we were contending that absolute prohibitions on all teacher strikes, regardless of circumstance and regardless of impact, were unconstitutional. We advanced a series of arguments. First we said that it violated standards of equal protection under the 14th Amendment. Surely, if a private school teacher, on one side of the street, is free to strike, why should his colleague in the public school who performs an identical service be prohibited? We argued that these bans violated First Amendment guarantees of free speech and assembly, that surely the right to strike is the ultimate expression of free speech and free assembly. In more ambitious moments, we argued that they violated the 13th Amendment in requiring employees to work against their will and were thus a species of involuntary servitude. There were difficulties with that argument, not the least of which was making it with a straight face, but in those days you took what you had and you went forward with it.

Recent decisions have all but closed the door on those constitutional arguments. They have been rejected by virtually every state high court that has had an opportunity to pass upon them—New York, California, Florida, Massachusetts, Connecticut, Kentucky, Rhode Island, Minnesota. The losses at the state level were always unfortunate, but as you know we have many states. It was my view that I could have made a career losing that case in fifty states.

Unfortunately, the federal government stuck its nose into our business with the Postal Worker cases in the early 1970's and a Circuit Court in Washington, D.C. flatly rejected all of those constitutional arguments. That has generally been cited now as the final word on whether those types of restraints are constitutional.

The progress we have made in litigation has been largely in the area of remedy and, specifically, the injunction. The first significant development we achieved in this regard was in Michigan in 1968 in the Supreme Court decision in the *Holland Education Association* case. Strikes in Michigan are and always have been illegal, but the Michigan Supreme Court held that that is not the end of the matter. Merely because a strike is illegal does not mean that a court should function as an automaton and issue an injunction upon request. The Court held that the injunction is an equitable remedy, and an employer—a school board that seeks it—must meet the traditional prerequisites for the exercise of equity jurisdiction. And they are two:

First, the court should inquire as to whether there will be irreparable harm if the strike takes place or continues. And the court made it clear that merely because a school will not open on the scheduled date is not per se proof of irreparable harm.

Secondly, the Court also said that a school board that precipitates or is the cause of a strike should not be allowed to come into a court of equity and seek help. In essence, the legal doctrine of clean hands—that he who seeks equity must himself have done equity. And on remand the Michigan Supreme Court directed the trial court to inquire as to whether the Board in that case had indeed bargained in bad faith as charged by the teachers.

There is a 1973 decision of the Rhode Island Supreme Court in the *Westerly* case which embraces the logic and reasoning of *Holland.* That's an interesting case and I urge you all to read it. The outstanding feature is an articulate and well reasoned dissenting opinion by then Chief Justice Roberts of the Rhode Island Supreme Court. Not only did he accept our argument that the absolute ban violated the First Amendment but, indeed, he concluded that it violated the inalienable rights of man, and you can't do a hell of a lot better than that. Unfortunately, that is dicta in a dissenting opinion which is one step above what Justice Roberts might have told you had you met him in the men's room. Notwithstanding, it does emerge as the best judicial statement to date of our position. There have been similar holdings by the New Hampshire Supreme Court in the *Timerlane* case in 1974 and by a trial court in Littleton, Colorado in 1975. But we can hardly say we have created a bandwagon. Now we will continue to pursue litigation in the courts because in this business one must believe, and I do. I believe. I believe that in this great land there is a judge who will buy any idiotic theory that we can concoct. My problem for the last fourteen years has been to find that judge. But we continue to search. However, illegal strikes are losing their attraction for me. Courts are becoming increasingly hostile. It is no longer just a slap on the wrist and a suggestion that the parties go back to their primary business, which is educating children.

### A Record of Penalties

The first major teacher strike I was involved in was in Newark, New Jersey in 1964, and we got a fine levied against us of $15,000. In New Bedford, Massachusetts, our organization in 1979 was fined $50,000. In Freehold, New Jersey in 1971, we were fined $100,000. We hit the jackpot in St. Louis in 1973 when we were fined over $600,000. Of course, we did not pay any of that and have worked it off teaching remedial reading at $10 an hour, but it's still one hell of a fine. There was another go-round in New Bedford, Massachusetts in 1975, and in six years we went up from $50,000 to $350,000, which is substantially ahead of the going rate of inflation. There have been large fines this year in Washington, D.C. against the Washington Teachers Union, and the current undisputed leader in this field is Bridgeport, Connecticut which was fined $920,000 in contempt fines for a strike that took place in October 1978. Those fines are now on appeal. I believe the theory is cruel and unusual punishment.

More important than the fines are members. The teachers we represent are beginning to see the insides of jails. We have so many teacher leaders in jail in New Jersey, we hold our leadership conferences at the Essex County Court House. There have been jailings this year in Memphis, Tennessee and Marion, Indiana and several other states. Again we must look to Bridgeport, Connecticut for leadership. There the largest mass jailing of public employees in United States history took place when 265 teachers were jailed last fall. The height of indignity in that strike was that they were not only jailed but were ordered by the judge to pay $28 a day for room and board in addition.

School boards have become more sophisticated. How I long for those thrilling days of yesteryear when the mere threat of a strike produced a Chicken Little reaction. School boards no longer seem to panic. They have learned that they can take a strike by teachers. There is, indeed, some irony to this. For years, I have been in court arguing in injunction cases that while teachers perform a vitally important function, they don't really perform a function that affects the public health, safety or welfare. I rarely won a case. But I was right all along. We are not like firemen, or policemen. We are not like sanitation workers in New York City in July. And certainly, we don't have the awesome power of the drawbridge operators who, when dark is settling on Manhattan, can lift the bridges and panic two million nervous suburbanites. We do not have that kind of power.

School board counter-measures are becoming more sophisticated. In the early years there was a knee-jerk reaction. If there was a strike, the school board went and got an injunction. If the injunction was violated, the school board sought a contempt citation. School boards have now learned there are other options. They have begun to discharge and discipline illegally striking teachers. There has been the absurd suggestion recently that unions as organizations may be financially liable on contract or tort theories for damages in all illegal strikes. There is a holding to this effect by the California Supreme Court in 1977 in the *Pasadena* case. When it is cited in other states, our best defense is that, since it comes from California, it is by definition an aberration.

### Legalization of Strikes

To a large extent, the problem of the strike stems from its illegality and efforts have been made to legalize teacher and other public employee strikes. The first movement in this regard was in Vermont which is one of the great labor pioneering states in the country. On September 1, 1969, Vermont passed a teacher bargaining law which provided that injunctions could be issued only if it could be demonstrated in court that the strike posed "a clear and present danger to a sound program of school education, which in the light of all relevant circumstances, it is in the best public interest to prevent."

I participated in the drafting of that law. I have not the slightest idea what that phrase means nor, I suspect, does any judge in the state of Vermont. But it was a step forward. It was the first explicit legislative relaxation of the absolute ban on all public employee strikes.

Since that time, several other states have legalized strikes for some or all categories of public employees under certain circumstances–Pennsylvania, Hawaii, Alaska, Oregon, Minnesota, Wisconsin. The only state in which public employees have an unlimited right to strike is Montana by virtue of a Supreme Court interpretation of their public employee bargaining law.

But experience indicates to us that legalization of the strike is not the complete answer. The strike is, at best, a mixed blessing. It cures some of the problems, but not all. Even in a legal strike, the school board can replace the striking teachers. Moreover, since the injunction is removed, the strikes tend to run longer and financing for our members becomes a greater problem. Because of these and other difficulties, there is increasing recognition by public employee unions that the strike in and of itself may not be the best long-range answer.

**Binding Interest Arbitration**

There is, and has been, an on-going search for alternatives and a noticeable trend toward some form of binding interest arbitration. At the end of calendar year 1977, in 19 states there was some form of interest arbitration for at least some categories of public employees. Of the 19, eleven had traditional arbitration in which the arbitrator is free to fashion the award as he or she sees fit. Eight had some form of final offer selection arbitration, pursuant to which the arbitrator may not fashion an award to his or her own liking but must choose the last final offer of either the employer or the union that the arbitrator deems more reasonable.

Conceptually, this has much to recommend it. The traditional objection to binding arbitration has been that it chills the bargaining process. "Why should I make concessions," goes the theory, "if I know I will ultimately end up before a binding decision-maker and any concession I have made will hurt me, since the arbitrator will inevitably cut the difference in half?" The theory of last final offer selection is that the parties will come closer together as each modifies its offer to make it appear more reasonable. The theory is that there will be sufficient modification, even in two idiotic positions, to bring about a settlement.

Final offer selection arbitration has been used with certain categories of public employees in many states for many years with very mixed results. The first major statewide test for all public employees was in Iowa which enacted a last final offer selection, interest arbitration statute, effective July 1, 1975. The reports from Iowa, both by management and labor, and by impartials, are encouraging. There is a belief that the approach has worked. But I suspect it is probably still too early to make a definitive judgment.

I might point out that once the policy decision is made to have binding interest arbitration, that is not necessarily the end of the matter. Challenges have been lodged against many binding interest arbitration statutes on the ground that they violate state constitutional provisions, and the cases have gone both ways. New York, Rhode Island, and Massachusetts have sustained binding interest arbitration. Utah, Michigan, and Connecticut have struck down those statutes as unconstitutional. The basic attack on these statutes is that they constitute an unconstitutional delegation of legislative power. A few of the cases reject that on a conceptual basis, but most focus on specific inadequacies in the particular statute.

There are generally three inadequacies that trouble the courts. One is the method by which the arbitrator is selected, and whether he or she is politically accountable to the electorate or the legislature. The second weakness is that the standards that are included to guide the arbitrator in making a decision are often seen by the courts as vague or inadequate, allowing the arbitrator far too much freedom or flexibility in fashioning policy for the public sector. Finally, the argument is that the judicial review process is too limited. Most of these statutes provide the usual standard for setting aside an arbitration award–a showing of fraud, or arbitrary or capricious action. The courts have held that when an arbitrator is fashioning policy, as opposed to ruling on a grievance, the court must have greater review power. It must be able to look at the award and deal with it on its merits.

I believe those points can be dealt with in a statute and there is no doubt that a properly drafted impasse interest arbitration statute can survive judicial scrutiny in most jurisdictions. I would just conclude this point, as a personal observation, that I think this will be the trend. Over the next few years we will see increasing use of binding interest arbitration as a mechanism to resolve collective bargaining disputes and, somewhat ironically, it will be with the push of labor unions over the objection of the employers. I believe employers are now taking the position that they would rather have the right to strike given to employees than turn over to a binding decision-maker their authority to determine policy. In any event, I think we will see the mechanism used increasingly in future years.

### Union Security Issue

Let me turn now to the second issue which is union security. This is undoubtedly the primary new problem that has emerged in public sector bargaining in the last few years. In the private sector, if the phrase union security is used, it means the union shop–that is, an arrangement under which the employee must become a member of the recognized bargaining agent within a certain time after hire or lose his or her job. Negotiating that type of arrangement, as you know, is specifically authorized in the private sector by both the National Labor Relations Act and the Railway Labor Act. Except in a few states, the notion of mandatory membership in a private organization as the price of holding public employment, has not caught on.

The preferred alternative has been the agency shop, under which no one is required to join an organization, but those who choose not to must pay a fee to the recognized bargaining agent which is designed to offset the per capita cost of contract negotiation and contract administration. Most states do not explicitly deal with the agency shop in their public employee bargaining laws; the threshold question in these states is whether such an arrangement is legal as a matter of state law. In twenty states, there are "right to work" laws which either expressly or by judicial interpretation prohibit not only mandatory membership but the exaction of a fee as well. These right to work laws apply in both the public and private sector.

In some states which are not traditionally in the right to work camp, the legislature has built the concept into the public employee bargaining law. New Jersey is an example. It has a statute which gives public employees the right to "form, join and assist any employee organization of their choice." And then it goes on to say, "or to refrain therefrom." The New Jersey Supreme Court in 1974 held that the "refrain therefrom" language was a right to work law and prohibited not only the union shop but the agency shop as well. The New York Court of Appeals took a similar position prior to the amendment of the law. So have the Supreme Court in Maine and several other states.

### Agency Shop Problems

Even absent a right to work law or right to work language, other legal problems exist with the agency shop. Perhaps the most difficult is to properly dovetail an agency shop discharge with tenure laws or civil service codes which traditionally provide that a tenured employee may not be discharged other than for incompetence, negligence, violation of law or other just cause. We have argued that the failure of an employee to comply with a negotiated agency shop provision is just cause for discharge within the meaning of tenure and civil service statutes.

But this presents us with a dilemma. Usually it is the employer, the college or the school board, which is seeking to discharge an employee – for example to expand the reach of the just cause provision to items like participating in demonstrations against the Vietnam War, wearing a black armband, or living in a homosexual relationship – and it is the union that is traditionally trying to restrict the reach of the just cause provision.

Our argument has been to equate just cause with classroom or teaching performance and to say that you cannot extend it beyond that realm. Here we find ourselves with the shoe on the other foot. It is we who say that failure to pay a fee, which has nothing whatever to do with competence as a teacher or competence in a classroom, is indeed just cause for discharge under a statute. Fortunately, the dilemma has been solved for us because we have lost almost all of our cases. And the bottom line is that, despite ourselves, we are making terrific law on the reach of the just cause provision.

In an effort to resolve some of those problems, several states have enacted statutes regarding the agency shop–Massachusetts, Wisconsin, Hawaii, Rhode Island, New York, Oregon, Minnesota, California, Washington and several others. These statutes vary significantly: in terms of the amount of the fee, ranging from the equivalent of dues to a computed figure based on expenditures for collective bargaining; in terms of the method of payment or the method of enforcement–

whether the fee is automatically deducted or whether there must be a discharge for failure to pay; whether it is mandatory or whether it must be negotiated between the employer and the union.

### Constitutional Challenges

The state statutes help resolve the problems under state law but again they do not end the problem. Agency shop statutes have been challenged on constitutional grounds as violative of First Amendment, free association rights. The National Right to Work Committee, which is the self-styled protector of individual employee rights against compulsory unionism and various assorted afflictions, has brought a series of cases challenging the agency shop concept on constitutional grounds.

The leading case in this area is *Aboud vs. Detroit Board of Education* which was decided by the United States Supreme Court in 1977. The Court sustained the concept of the agency shop in public employment, but it drew a line. It said a fee is all right if the money is used to offset the costs of collective bargaining and contract administration, but it is not all right if the money is used over the objection of a dissenting employee for what the court terms "political and ideological activities."

In its decision, the Supreme Court left open what constitutes a collective bargaining expense and what constitutes a political and ideological activity. Most of the litigation, since *Aboud,* has been in an effort to decide what fits in which category. Clearly the cost of printing collective bargaining agreements, or the cost of processing a grievance, or the cost of running through an impasse mechanism, are collective bargaining-related and are includable in the agency shop fee. Equally clear is that lobbying for various social issues like abortion and gun control are not related to collective bargaining and must be rebated to the dissenting employee.

But there is a difficult middle ground. What about money spent by a union to lobby against Proposition 13 or its progeny? What about money spent by a local teachers' organization to help elect school board members who have indicated they are favorable on certain critical collective bargaining issues? These questions are now being dealt with in both the public and private sectors to divide the line between legitimate agency expenditures and political, ideological expenditures. It is the rather absurd contention of the Right to Work Committee that everything a public employee union does is tinged with political and ideological activity. It is a theory they continue to pursue despite the fact that it was explicitly rejected by the Supreme Court in *Aboud.*

There are cases now pending on the agency shop question before State Public Employment Relations Boards and/or courts in Massachusetts, Rhode Island, Hawaii, Michigan, California and other states. The centerpiece litigation, however, is a higher education case out of Minnesota which is now in the Federal courts, *Knight v. The Minnesota Community College Faculty Association.* It was instituted by the Right to Work Committee more than four years ago. Following *Aboud,* it was redirected from a challenge to the concept of agency shop to an allegation that National Education Association and its higher education affiliate are spending money improperly on political and ideological activities. Indeed, in the court hearing, before a three-judge federal court at the outset of the case the Right to Work lawyer announced that he would demonstrate in this litigation that there are three major political parties in the United States–the Democrats, the Republicans and the National Education Association. We were deeply troubled by this gross exaggeration and we filed a motion to have the Republicans dismissed.

This has been a brief summary of where we stand in regard to the resolution of collective bargaining impasse and the issue of union security. The law is in a state of flux, and it is virtually impossible to offer any definitive answers. What we can say with certainty is that these issues will occupy a substantial portion of our time and energies in the next few years. As I indicated at the outset, the manner in which they are resolved will largely shape the future of public employee collective bargaining in all areas, including higher education.

# 20. LEGISLATIVE LANDMARKS: CALIFORNIA—II

Stanley J. Bartnick

*Director, Employee Relations, California State University and Colleges*

Last year, at this conference, Ted Lang introduced me as the Director of Employee Relations for the California State University and Colleges where, he said, collective bargaining had been imminent for the past three years. When in September of last year the Governor signed into law a higher education collective bargaining bill, we discovered that the definition of *imminent* should be "that period of time which is four years or less." When collective bargaining finally did come to higher education in California, it did not come in the fashion or form that the experts predicted it would.

## The Historical Record

It was widely believed that collective bargaining would arrive in 1975 in the form of an omnibus bill that would cover all public employees in the state. In 1968, the counties and municipalities in California had been given the right to meet and confer with their employers and come to a memorandum of understanding. The process fell short of what most of us would define as collective bargaining, however, for two reasons. The employer retained the authority to act unilaterally even in areas which were covered by the scope of bargaining if in the employer's judgment it was necessary to do so. Management's only obligation in that instance was then to meet and confer with the exclusive representative after the fact. The other important feature missing was an independent board to

140

administer the process, something equivalent, of course, to the National Labor Relations Board or a Public Employment Relations Board.

From 1965 through 1975, teachers from kindergarten through the community college level had the right to meet and confer with the employer over wages, hours, and other terms and conditions of employment, but there was no duty imposed to meet and confer in good faith or attempt to come to any agreement. The employer's only obligation was to consider, as fully as he deemed appropriate, all issues presented by the employee organizations. The system called for proportional representation rather than an exclusive representative, so in many cases throughout the state, representatives of two employee organizations sat at the table with management. In a few, but not many, instances during that period of time, contracts with the employer were actually reached.

During the 1974 gubernatorial campaign Jerry Brown promised California's public employees collective bargaining rights. When he was elected and took office in January 1975, he had a solid Democratic majority in both houses of the state legislature. In January of that year, there was introduced a comprehensive omnibus collective bargaining bill, one which would have reached counties, municipalities, employees of school districts and community college districts, and all employees of the state, including those of us employed by the California State University and Colleges and our sister institution, the University of California system.

By August of that year, the bill was laid to rest in a legislative committee. Some say the bill's demise was caused by the Governor's failure to deal with the various interest groups and the legislature. Others blamed the inability of the several labor groups to come to agreeement on some controversial provisions of the bill. Some management groups clearly favored the legislation's passage, and others were opposed to it; some experts claim that it was this position that killed the bill. Probably, it was a combination of all of those factors that resulted in the bill's death. During that same legislative session, a collective bargaining bill covering only the employees of school districts and the two-year community colleges was introduced and, with remarkably little opposition, sailed through the legislature. It was enacted into law on January 1, 1976. One year later, a collective bargaining bill covering all state employees, except for those employed by the University of California system and our California State University and College system, was enacted and became law on January 1, 1977.

During April 1977, a collective bargaining measure covering both the University of California and the California State University and Colleges was introduced. It moved through the Assembly with very little opposition but became bogged down in the Senate Education Committee. Because California had in 1977 gone to two-year legislative sessions, the bill was not as dead as it appeared to be. It remained there, ready to be resurrected at any time during the next calendar year when the legislature was again in session. In August 1978, the bill was indeed resurrected and passed by the Senate Education Committee and the Senate Finance Committee, and made it off the floor of the State Senate with votes to spare. In September 1978, it was signed by the Governor, and its provisions will become fully operative on July 1 of this year.

Some "experts" predicted that collectibe bargaining in higher education will not work in California. The public sector employees in the state of California never did receive one comprehensive, omnibus collective bargaining bill. The approach was piecemeal, but all employees of the state of California, with the exception of counties and municipalities, are now covered by the provisions of collective bargaining legislation. A bill that will grant full collective bargaining rights to those employees will be introduced shortly, and my information is that, as of May 25, management and labor are close to agreement on its provisions.

Let me take just a moment now to detail some of the key features of the California Higher Education Employer-Employee Relations Act which will be administered by the same three-member Public Employment Relations Board that was created by the Kindergarten-through-14 collective bargaining act passed in 1975. Members are appointed by the Governor and serve five-year, staggered terms.

## Scope of Bargining

The scope of bargaining includes wages, hours of employment, and other terms and conditions of employment minus specified subjects, such as the amount of fees charged to students, admission requirements for students, conditions for the award of certificates and degrees to students, and so on.

For the University of California, procedures and policies to be used for the appointment, promotion, and tenure of members of the Academic Senate (which body includes all tenured and tenure-track faculty); the procedures to be used for the evaluation of members of the Senate; and the procedures for processing grievances of members of the Senate are all excluded from scope. If, however, the Senate determines that any of those matters should be within scope, or if any of those matters are withdrawn from the responsibility of the Senate, the matter(s) shall be within the scope of bargaining. The Academic Senate, for the California State University and Colleges is a representative, statewide body with 2 or 3 faculty elected from each of the 19 campuses.

The Act provides that, for the California State University and Colleges, criteria and standards to be used for the appointment, promotion, evaluation, and tenure of academic employees shall be the joint responsibility of the Senate and the Trustees. In our present circumstances, that responsibility cannot properly be regarded as joint. The law states, however, that if the Trustees withdraw any of the matters referred to above from the responsibility of the Senate, the matter or matters will be within the scope of bargaining.

## Managers and Supervisors

Managers are excluded from coverage. Supervisors may organize into a single unit consisting of all supervisors but may not bargain collectively. Their right is only to meet and confer with the employer and present their views on new policies or changes in courses of action.

## Supersession

Despite frequent references to a collegial form of governance, to a great extent we in California have had governance by legislation. Over the years the state legislature has passed numerous laws dealing with matters which in our view are properly in the purview of the California State University and Colleges and the University of California. Statutes presently operative deal with academic grievance procedures, layoff procedures, military leave, prevailing wages, etc.

We were successful in having written into the law a section which provides that any statute named in the collective bargaining legislation in conflict with a memorandum of understanding will fall. That is, the statute will be superseded by the provision of the contract.

### Rights of Students

Students employed by the system whose jobs are not directly connected with their academic pursuits have the right to organize. Further, a student representative has the right to sit in on negotiations and to comment at reasonable times on matters of concern to students.

### Participants in Bargaining

During negotiations between the California State University and Colleges and an exclusive representative, a representative of the Governor is required to be at the table for the purpose of advising the parties on matters that would require the Governor's approval. A representative of the Speaker of the Assembly and a representative of the Senate Rules Committee *may* be present to advise the parties on matters which may require funding or legislative approval. There is no similar provision for the University of California system.

### Union Security

Neither union shop nor agency shop may be negotiated into a collective bargaining agreement. The only form of union security provided for is maintenance of membership.

### The Outlook

The experts were wrong regarding their prediction of the fashion and form in which collective bargaining would arrive in California. It is my belief that the experts, legislators, and others who have predicted that collective bargaining will not work in California higher education are just as much in error as that first group of experts. Certainly the administration of the California State University and Colleges is committed to doing everything possible to insure that the process works.

# 21. ARE THERE ALTERNATIVES TO COLLECTIVE BARGAINING?—I

David Newton

*Vice-Chancellor, Long Island University*

If this symposium were a negotiating session and in the language of collective bargaining, if the issue on the table were truly the question of whether there are alternatives to collective bargaining in higher education, then I believe my colleagues and I would have little difficulty in reaching agreement, and signing off in record time. Obviously, there are alternatives. Only one-third of the nation's 3,000 post-secondary institutionas, and less than one-fourth of the one million professional employees in higher education are covered by negotiated contracts. Alternatives exist that run the gamut from total administrative control to almost equal dominance by faculty in collegial institutional decision-making.

The real issue is not whether there are alternatives but whether collective bargaining is an appropriate and effective form of faculty representation. As a reluctant dragon in the collective bargaining arena during this past decade, I have become less romantic, if not more clear-eyed, about the realities of life in contemporary institutions of higher education. Consequently, I now believe that the majority of the nation's faculty members could opt for collective bargaining with a clear conscience.

Moreover, the Yeshiva case notwithstanding, I have come to the conclusion that in all but a minority of institutions (those with sufficient financial endowment to adequately support academic excellence and to afford the luxury of collegiality), collective bargaining is not only appropriate but is probably a more honest form of faculty representation than fraudulent collegiality. Despite all the talk about shared authority for the majority of the faculty, especially those holding non-tenured, lower rank and those employed in less prestigious institutions, collegiality, like the concept of teacher, scholar, researcher is more myth than reality.

## Fact vs. Fiction

The issue of collegiality versus collective bargaining that has consumed an inordinate amount of our time and thought this past decade, and that continues to be discussed at conferences and in print ad nauseam, is largely a phoney issue. It seems to me clear that the choice to be made is not between governance by shared authority or representation by collective bargaining, the real choice is between fiction or fact. And the fact is that our colleges and universities have hardly been Edens, all perfect until defiled by collective bargaining.

Only the quixotically self-deluded would deny that true collegiality exceeds even scholarly excellence in its observable absence on most American campuses. The nation's professoriate can legitimately claim that at least twenty percent of its membership engage in sustained and published scholarship. But it is doubtful that more than five percent of our institutions of higher learning could ever legitimately claim to function operationally with a collegial system of governance. The gap between the reality and the myth of collegiality is not being widened by collective bargaining. It's being contractualized.

### A Reflection of Reality

Collective Bargaining appears to me to be far less destructive to higher education than it is reflective of it. In this context, the philosophical observation that when an ass looks in a mirror, one can hardly expect an angel to look out is particularly relevant. The current economic and educational pathology of our system of higher education was not caused by faculty unionization. Our nation's newest goal for higher education—to fuse rare and brilliant scholarship with universal access – is destined not to become another successful Manhattan project unless it is equally well funded. But it was not collective bargaining that launched this under-funded Mission Impossible. Nor did collective bargaining create in both public and private sectors inferior colleges and universities that exist with no clear definition of academic mission or purpose.

The erosion of the principles of academic professionalism and the moral evaluation of the profession were discernible during the early sixties—long before the unionization of higher education. The shift in faculty performance standards from insistence on excellence to reliance on merely satisfactory service may be buttressed by collective bargaining, but it certainly was not engendered by it. In short, I for one do not think that the ivy had been made more poisonous by unionization and collective bargaining. Indeed, one would be hard pressed to find any evidence during the past decade that collective bargaining per se has significantly altered the academic mission or the achievement of excellence or the academic standards or the quality of faculty in a single college or university.

### The Industrial Model?

On the other hand, now that academics have embraced straight unionism, there may be some real cause for concern with regard to the great Americal labor movement and collective bargaining. No longer is it considered an act of professional defection to vote for a collective bargaining agent, provided of course, that one's professional dignity is maintained by avoiding "the industrial model."

The arrogance of such pride is matched only by its ignorance of the true nature and history of the labor movement and collective bargaining. Apparently, the term industrial model evokes, in the rich fantasy life of the professoriate, a vision of coming dressed in an academic gown to stand on a receiving line in a union hiring hall. There are as many different models or forms of bargaining as there are labor unions and industries, including higher education.

Ironically, one could probably find alternatives to collective bargaining among the current forms of collective bargaining in higher education. Surely, the NEA model for collective bargaining is not the AFT style. And everyone is aware that the AAUP's professed form as a keeper of the older traditional legacies is not that of any conventional labor union. Even the legal framework that determines the perimeters of bargaining is different in the public and private sectors and varies as well from state to state. Regardless of the setting in which it takes place, the bargaining process is conducted by humans who are free to use their intellects, imaginations and creativity to shape its course and results. The legal framework of collective bargaining provides wide latitude for human ingenuity and conduct.

The old labor maxim that management deserves the union it gets is as true in higher education as in any other industry. But it is also true that the faculty deserves the union representatives that it elects and that both the administration and the faculty assuredly deserve the contract they negotiate. My own experience these past ten years has reenforced my belief that collective bargaining as a force for good or ill in academe is largely what its practitioners and their respective constituencies want it to be. This may be a crude conclusion but I am convinced that the selection of the representatives who sit on opposite sides of the table, the conduct of the parties during negotiations and the contract bargained, all provide a mirror image of an institution. A campus or a system which has characteristically been committed to students and to the educational process and where both administrators and faculty function within a set of generally accepted norms, assumptions and conceptions regarding the academic integrity of the enterprise will have those values and attitudes reflected by the bargaining parties and in the negotiated contract. Similarly, when the educational enterprise has been characteristically more entrepreneurial than academic, when both the administration and the faculty are engaged in collusion, spoken or unspoken, for the commercializing and selling of credits, and the parties are engaged, not so much in the search for truth as for an extra buck, those entrepreneurial instincts and practices will also be reflected in the terms and conditions bargained.

**The Choice of Representatives**

The composition of the local bargaining teams clearly illustrates the reflective nature of collective bargaining. It makes little difference whether the local faculty union marches under the banner of affiliation with one of the national giants–AFT, NEA, AAUP 1–1 or under the mantle of independence. What is significant is who, locally, is elected to represent the faculty at the bargaining table. If the union's negotiations are predominantly non-teaching professionals, faculty lacking appropriate credentials or tenure faculty or more politically than professionally oriented one can almost predict that while wages may go up and workloads may go down, academic discrimination and academic judgment will be lacking.

A local administration can be equally guilty of showing its true colors regardless of what noble Latin motto is engraved on its institutional shield. When the trustees or the administration select as their negotiators the institution's business officer, a personnel director, the development officer, the vice president for student affairs and a token dean, usually from the school of business, the institution's cost effectiveness may be protected but probably at the expense of its educational effectiveness. For certainly, where both parties hire as their spokesperson our modern day mercenaries, representatives of the legal profession, not only will academic jargon be replaced by legalese, but the settlement reached may well increase attendance in the halls of justice rather than the halls of learning.

Much fear has been expressed in academic circles regarding the adversary and political nature of collective bargaining. An innocent might conclude that conflicts and politics were alien to the more traditional forms of faculty organization and representation. Divorced from a responsible faculty, any organization, senate, council, association, union, can indeed become a powerful force for the destructive polarization of faculty and administration on a campus.

As for collective bargaining specifically, before the process begins, a faculty must first opt for union representation. The exercise of that option reflects a faculty's perception of an already existing schism having nothing to do with the collective bargaining process itself. Once selected, however, a union's leadership may deliberately seek to maintain and exacerbate that sense of polarization in the belief that such a climate of hostility is necessary to ensure sustained faculty support for union representation. When this is the case, one can expect the union, by its conduct in negotiations, to exploit the collective bargaining process in an effort to magnify and emphasize polarization. Under those conditions, the bargaining process itself becomes an active and efficient cause of further polarization. The danger may be reduced to the extent that an aware and responsible faculty selects and controls the manner in which its representatives go about the business of negotiating.

My point here is that although openly and admittedly adversary in concept, collective bargaining in practice need not be used to incite and institutionalize conflict between faculty and administration to the detriment of their common interest, the academic mission. I'm assuming, of course, that in addition to Yeshiva there may be one or two institutions where such real interest or bonds still exist. Collective bargaining need not be unprofessional and inimical to the academic mission of the professors' profession.

## The Impact of the Contract

Despite the legal mandatory and non-mandatory limitations with regard to subject matter involved in bargaining, contracts have been negotiated that provide for the traditional collegial structure in appointment, promotion and academic policy in institutions where the preservation of those conditions has real meaning. Obviously, contracts have also been negotiated that provide for automatic promotion; instant tenure–once hired, never fired; and an unlimited opportunity for the faculty to engage in remunerative professional and nonprofessional outside activities.

Academic freedom, tenure and due process have also been protected in negotiated contracts–both with and without reference to formal AAUP statements. Incidentally, I'm not persuaded that the protection of academic freedom or due process is any longer necessarily conditional upon the existence of the tenure system or for that matter on the AAUP. Collective bargaining or no collective bargaining, the changing role of higher education in American society demands a careful reassessment of faculty hiring, promotion, and retention, especially with regard to tenure.

The critical fact, however, is that rational and responsible people can be honest adversaries engaged in good faith bargaining without having to resort to hypocrisy, hostility or enmity. Where a spirit of institutional good will prevails and when the adversaries have mutual respect for each other's representatives and positions and the economic realities, polarization will tend to diminish rather than increase.

For those of you who may be surprised at my somewhat Panglossian view, let me hasten to explain that it is prompted by the recent creative example set by Egypt's Sadat and Israel's Begin on a world scale. It may also take thirty years for the participants in higher education's collective bargaining to reach that level of maturity, but at least there is now a basis for realistic hope.

However, when all is said and done, the fact remains that faculty, like all human beings, need food, clothing and shelter. Like all other employees, they want to be compensated, satisfied, and protected in their jobs. Their academic robes provide them with no better insulation than a mechanic's overalls against the cold, pervasive facts of inflation. In higher education, I believe, the faculty join unions for the same reasons that steel workers, bus drivers, firemen and secretaries do—to get better wages, improve conditions of work and job security. Their status, deserved or not, as professionals with historic involvement in establishing both the standards and controls of their conduct as professionals, includes their right to select that form of representation which they believe best serves their interests as employees and professionals. Obviously, in growing numbers, many of them are choosing collective bargaining as their preferred alternative.

Aaron Levenstein indicated that of general concern to all of us is the future of higher education. The future for both higher education and academic profession can be conjectured. For whatever it is worth, let me share with you the crystal-ball gazing done by Professor Walter P. Metzger, noted historian at Columbia, who writes of what lies in store, "One may nourish the hope that from the residual and abiding strength, the human desire for a noble work, the lingering sense that learnedness is a kin to blessedness, the quest for inimitable achievement that goes with strong disciplinary commitments, the academic profession will gather what it needs to preserve itself and remain intact. But this may be a sentimental hope. It may be more realistic to assume that out of the sortings taking place will emerge two very different entities – a relatively small profession centered in the non-unionized moderately delocalized, mostly private research-oriented universities and higher grade colleges, and a much larger work force composed of persons called faculty members out of habit but who are in no significant way differentiated from other trained attendants in the teaching enterprise and barely distinguishable from the multitudes engaged in bureaucratized, white collar work—a lumpen professoriate so to speak." He may be right.

# 22. ARE THERE ALTERNATIVES TO COLLECTIVE BARGAINING?—II

Sidney Hook

*Hoover Institution, Stanford University*

Six years ago at the opening session of the First Annual Conference of the National Center for the Study of Collective Bargaining in Higher Education I delivered the keynote address on "The Academic Mission in Higher Education". I contended on the basis of various considerations (which I will not rehearse here) that intelligent choice in our time is not between acceptance or rejection of the principle of collective bargaining but between the different forms of collective bargaining. My primary concern – admittedly narrow – was to determine the best forms and conditions under which the *academic mission* of the university could be preserved and strengthened. There were and are other legitimate concerns, but for institutions that aimed at the achievement of intellectual excellence concern for the academic mission had priority.

Today we face a mounting crisis with respect to the principles of collective bargaining at least in the private sector of higher education. One of the main causes of the crisis is the decision of the Second Circuit Court of Appeals in the Yeshiva case which ruled that its faculty members had "managerial status." If sustained by the Supreme Court this would foreclose any legal necessity for private universities to negotiate with faculty unions and would in all likelihood lead to the ultimate abandonment by the comparatively few private colleges – much less than a hundred – of their existing labor contracts.

A contributing factor to the crisis is the apparent decline in public support of the principle of collective bargaining, judging both by opinions expressed in the media, in the figures of union membership, and the results of contested elections held by the NLRB. This is a complex phenomenon about which I shall have little to say. But about another contributing factor I know a little more. I refer to the reluctance of faculties of private colleges and universities, whose members when polled strongly approve in principle collective bargaining in *industry*, to approve it for their own institutions, and indeed to reject it in favor of *ad hoc* agreements and negotiations between administrations and faculty representatives.

## Implications of the Yeshiva Case

I shall have little to say about the Circuit Court's decision in the Yeshiva Case especially in view of the brilliant analysis by Professor Aaron Levenstein in the Sept.–Oct., 1978 issue of the Center's *Newsletter*. But despite the Court's express statement that its decision was not to be held as binding for all private higher education institutions and was restricted only to situations similar to those found at Yeshiva, if that decision is upheld, it will have a very broad application. For the criteria enumerated by the Court to determine whether the Yeshiva faculty exercised the managerial and supervisory functions that exempt enterprises from the mandatory bargaining provisions of the National Labor Relations Act can with interpretive skill be stretched to cover existing practices in very many other institutions. On paper it is easy to delegate to the faculty functions that can be considered as tantamount to authority to act "in the interest of the employer" and as equivalent to effectuating the University's policies in matters of appointment, promotion and tenure. But whether the faculty actually functions in ways described is an altogether different issue very hard for any Court to establish. If I am correctly informed members of the Yeshiva faculty are not so much protesting the decision as demanding of the Yeshiva administration that the faculty be allowed actually to exercise the functions which the University's legal brief contended it already has.

I don't for a moment mean to denigrate the importance of having provisions formulated on paper but what they really mean can only be interpreted in actual practice. At N.Y.U. where I spent most of my teaching life it was always possible to find provisions for faculty policy-making which on their face clearly differentiated the university from the typical industrial establishment. But in the early years – the twenties – they were in fact interpreted in such a way that most teachers had no more tenure than factory operatives and less protection against arbitrary dismissal than workers in organized industry. The collegial relationship that then existed between the administration and the faculty is perhaps best indicated by the jesting definition of an Assistant Dean which I heard from my colleagues during lunch on my first teaching day. I was asked to define an Assistant Dean, and having given the obvious answers, was corrected and told "An Assistant Dean is a mouse in training to be a rat."

## The Outlook for Collective Bargaining

A decade ago it was widely observed that collective bargaining in education represented "an idea whose time had come." In the light of current realities I am *not* saying that it is an idea whose time has come and gone. I am saying that it is an idea that is marking time. It may be that if the economic situation deteriorates to a point where wide-scale efforts are made to reduce existing faculty positions there may well be a resurgence of support for collective bargaining in the private sector of higher education.

Leaving aside that contingency, I wish to devote my discussion to the unlikelihood that it will make much progress in this area, the chief cause of that unlikelihood and its bearing on the strategy of those who favor it.

To begin with I should like to point out that the improvement in the degree of *shared authority* between faculties and administrations in private higher education, observable in the last decade or so, tends to be an obstacle to the acceptance of collective bargaining. But it seems to me to be indisputable that the main cause for the growth of that shared authority is the very existence of the collective bargaining movement and sentiment, and the possibility, some would say, fear, among administrations in some institutions that faculties would vote for it.

At New York University, for example, the faculty when given a choice rejected collective bargaining. In part this was due I believe to the fact that some of the most conspicuous spokesmen for collective bargaining were identified with the view that approved of the politicalization of the university. But of much greater weight was the assignment of authority to an elected Senate body accompanied by an extension of the democratic process of shared authority to departments with respect to matters that had previously been decided by administrators or non-elected Chairmen. But this is still far from satisfactory. Only recently the Administration phased out the Ph.D. program in Philosophy and Slavic Studies despite the evidence that the faculty of the Graduate School was opposed to the move.

## The Issue of Excellence

There was a certain price that sometimes had to be paid for this desirable sharing of power. In one Department that shall here be nameless the Chairman after consultation with his colleagues in the Department would invite new members. Within a few years the existing faculty consisted of individuals all of whom the Chairman had invited after consulting with the existing personnel. In each case he had overriden the advice of a majority of those whom he consulted. Nonetheless as time went on his judgment was vindicated. He had developed a small but prestigious Department notable for its teaching, scholarship and public service, whose members worked in reasonable harmony despite the fact that the initial appointment of each of them had not had majority approval. There came a day when although formally the Chairman still had the power of initial appointments he decided to extend the principle of shared democratic authority in anticipation of a joint administrative Senatorial ruling for the entire university. He recommended that the Department invite a scholar whose capacity and professional standing easily surpassed that of any of the current members of the Department but this time he left the decision to them. By secret ballot, the recommendation was voted down. There was only one affirmative vote – his own. Had the same democratic procedure been followed with previous appointments none of those present would have been there to vote.

I am not saying that this result which tends to bring about the rule of mediocracy is necessarily entailed by democratization or by collective bargaining. It is not even a legitimate ground for rejecting collective bargaining by those institutions who do not regard themselves primarily as leading centers of academic research and creative achievement on the frontiers of the major disciplines. There are other important educational functions that can be performed by faculties without Nobel laureates or even many members of major Academies in the Arts and Sciences.

Nonetheless I believe that the greatest obstacle to the acceptance of collective bargaining by the first tier private universities – Harvard, Yale, Columbia, Chicago, Princeton, Cornell, Stanford, etc. – is the fear that collective bargaining will in time threaten their academic mission and lead to the loss of their intellectual pre-eminence and distinction. The paradoxical fact is that even though the great majority of tertiary institutions of education cannot reasonably be regarded as important centers for the advancement of human knowledge and understanding, were any of the first tier universities in the private sector to accept the process of collective bargaining, it would have a tremendous influence on colleges and universities of different tier or rank. Where there are genuine scholars, and they can be found elsewhere than in institutions of the first tier or rank, they will never abandon their ambition to achieve excellence as much as they deplore the conditions that interfere with its pursuit. After all, if it turns out that the faculties of Harvard or Stanford did not fear the effect of collective bargaining on the academic mission why should less distinguished faculties fear it?

### The Role of Tenure

All of us know that a great university is defined by the presence of a great faculty. Great faculties are built, they do not automatically develop merely from the presence of a competent faculty. This means that, since no institution can expand continuously, tenure canot be earned as is the case on the primary and secondary levels of education merely by evidence of *satisfactory performance* judged by criteria established in the past.

This is something that the laymen, including jurists, find extremely difficult to understand. In most situations of employment where the acquisition of tenure is possible, it is reasonable to request and to receive an indication of the conditions or criteria that will govern the granting or withholding of permanent tenure upon the lapse of the probationary period. In most of such situations, the minimal requirements of satisfactory performance can be stated fulfillment of which normally entitles one to tenure. Why can't that apply to a great university as well as any other institution?

To avoid misunderstanding, I want to stress that despite criticisms of the tenure system, I firmly believe that it should be permanent, subject of course to the usual conditions of the professional code of behavior, and I have spelled out the reasons at length elsewhere. (Cf. Chap. 13 in my *Education* and *the Taming of Power,* LaSalle, Ill. 1973). But what I am now discussing is not the defense of the system of tenure but the conditions of its acquisition. And what I am saying is that in building a great faculty, and indeed from the point of view of the academic mission of the great university, merely satisfactory service may not be good enough. As good as a man or woman may be, some other scholar and teacher whose services are available, may be much better, from the point of view of the needs of the department, the discipline, and even of the students. No type of collective bargaining that does not recognize this is likely to be accepted by faculties of the first tier in the private sector of higher education.

### The Academic Mission

What I am urging is not different alternatives to collective bargaining but different strategies of collective bargaining. It seems to me obvious that there can be different types of contracts for different types of educational institutions, and I believe it is possible to work out an approach for universities of the first tier that will respect their academic mission not only in regard to the all important detail of how permanent tenure is to be acquired but in other areas as well. The sharing of authority does not require that when academic decisions have to be made the authority must be shared equally, and that after every one affected by an educational decision has been consulted, every one should have an equal vote in the decision.

It seems to me that the prospects of inducing faculties of universities in the private sphere of higher education to accept the process of collective bargaining would be considerably enhanced if the organizations devoted to it made as a focal point of their activities the defense of the freedoms of teaching and research which are integral to the academic mission. Today the autonomous academic functions of the universities are more and more being interfered with by the government bureaucracy, by the courts, by politicalized student bodies, and occasionally by legislative bodies. The history of the distortions of the Executive Orders on affirmative action shows that administrations cannot be relied on to ward off attacks on the merit system. Were the professional organizations of teachers *in this sector* of education conceived as champions of the academic mission rather than as defenders of job security and seniority, they would have a better chance of being accepted. There is no necessary incompatibility between the concern with, and pursuit of, educational excellence and the quest for reasonable standards of economic security and remuneration.

Crucial to the operation of private institutions of education is the allocation of the anticipated income from tuition, endowments and grants to faculty compensation, plant expansion and maintenance, fellowships, student aid and services, library and research facilities, administrative costs and related items. So far as I know, even in the most prestigious universities, the decisions concerning these allocations are made by administrators, and faculties who are ostensibly the center of administrative concern more often than not are confronted by a *fait accompli* that leaves very little room or even time for negotiation concerning the wisdom of the proportionate allocations. It is here, it seems to me, that faculties can legitimately claim the right to have a greater share in the pooled judgment and decision concerning the allocations of total income to the various rubrics of the operating budget. The *execution* of details will always be an administrative matter but the educational guidelines should reflect the consensus of the faculty or its delegated representatives. The request for the extension of faculty input and decision in these areas, particularly in times of increasing inflation, seems to me to be the most promising approach in winning support for the principles of collective bargaining on the campuses of private universities.

# 23. ARE THERE ALTERNATIVES TO COLLECTIVE BARGAINING?—III

Albert Shanker

*President, American Federation Teachers*

"Are There Alternatives to Collective Bargaining?" The answer is obvious and simple: yes, there are alternatives to collective bargaining, not only in higher education, but in the private sector, in industry. The majority of the American work force is not unionized or organized, as the work force is in other countries, and there are a number of models that exist outside of higher education. One can assume, that to some extent, these models will exist in higher education as well.

In a major part of our economy workers may wish to engage in collective bargaining, but due to the activities of their companies, their employers, their corporations, they are unable to do so. I suppose the outstanding national example at the present time is a company like J.P. Stevens. Throughout our history we have had no shortage of companies that engage in some type of repression or punitive activities so that one may never know whether their employees are acting on the basis of their own free will or are acting on the basis of fear.

## Alternative Models

Having traveled across the country, I must say that in some institutions of higher education there is a considerable amount of fear—fear of retaliation, fear of punishment, fear of loss of position, fear of what may appear on a future reference. Such motives may result in alternatives to collective bargaining. Whether anyone here would care to advocate or celebrate such alternatives is something else, but clearly they exist.

There is a second type of alternative that is frequently talked about in the private sector. We have our Eastman Kodaks and IBMs, companies which on some paternalistic basis appeal to their employees, arguing that the company voluntarily provides a standard, not only in the paycheck but in all kinds of amenities that equal or perhaps exceed what unionized workers have to struggle for. The company makes either a direct or indirect appeal saying: "Look, if you decide on collective bargaining maybe you'll end up getting only what you have now after a long and hard struggle. But we have a system: we don't want the union, and we want to have the freedom not to deal with one; we provide you with what the most effective unions are able to provide and perhaps a little bit more, and you have it without a struggle, without the payment of dues, without the organizational involvement, without the risks." There is no doubt that in higher education one can point to institutions where that model prevails.

Of course, this is not in a letter that goes out from the president or the chancellor or the board of trustees. It is understood. It is the subject of many faculty discussions and conversations. But there's no doubt that there are institutions where that is the prevailing view. It is an alternative, and it may very well be an alternative for a long time to come. It may be that some of these institutions will never opt for collective bargaining.

### The Collegiality Model

Now there is a third alternative which we don't find very much in the industrial sector but which is most intensely discussed in the field of higher education. That is the model of "collegiality," the idea of some kind of partnership. I know that many of my colleagues in the union movement would deny that any such model exists at all. I hasten to say that I do not. I think it does exist.

But I also think that it is extremely rare. For every place where it exists there are probably two hundred places where they talk about collegiality and would like to have it sort of rub off on them, but where it does not really exist.

Now, having said that there are alternatives, I think I must go on to say that I really don't think that that is the important question. Because there are other issues, the question, "Are there alternatives to collective bargaining?," becomes extremely unimportant.

First, I think it needs to be said that the existence of other alternatives does not automatically provide an answer to the question of what is most desirable for those who work in colleges and universities. We may argue about collegiality, but we know that there are institutions where there is a paternalistic type of partnership, and there are others where there is a rather repressive relationship.

This means, of course, that in any given institution people should have the opportunity to decide for themselves whether collective bargaining is the way they want to go. The initial part of the collective bargaining process–that is, the right of employees to petition, to be involved in a collective bargaining election and to determine by secret vote whether they wish to have an organization represent them for the purpose of collective bargaining–is inherently democratic. It is appropriate and it is also self-correcting. Thus, in an institution where people feel that everyone is a colleague and there is no management, it would be hard to imagine that faculty would vote for a collective bargaining relationship in the traditional sense. On the other hand, the mere fact that a majority of those voting in such an election choose a union should lead us to question the claim that there is such a perfect relationship of collegiality.

### Basic Considerations

I would like to talk about something else that needs saying. Let me start by giving a brief picture of what unions and the union movement are all about because I think it is relevant to the kind of choices that are being made by college faculties throughout the country.

Almost every worker who decides to pick a union as a collective bargaining agent generally does so on the basis of some specific problem or grievance or dissatisfaction at the job level: "Yes, I want more money; I want a better pension; I would like to have a right to my job; I would like to have some due process procedures; I would like to have in writing certain things that have been in the policies of the company, and if those policies are applied to me in a discriminatory fashion, I would like to have some impartial person decide whether I was indeed discriminated against."

That's why workers typically vote to select a union. But while employees at Plant A and Plant B and Plant C are voting for the union and are electing committees to engage in bargaining and are negotiating contracts and employing local staff to handle grievances and administer those contracts, something else is happening. At the state, the regional, and the national level, they are supporting and building organizations that advance the interest of those workers, interests that they may not even be aware of at that particular moment.

Thus the auto worker may join because he doesn't like the assembly line; it dehumanizes, and he wants a few more cents an hour. He reads about the Teamsters' settlement and he says, "Well, we're not going to let them pull ahead of us; we're going to do just as well." But the meaning of the auto worker's union goes far beyond that particular contract. The union is involved at a national level in negotiations with the federal government. Many of these issues involve cooperation with the industry on questions of auto emission standards and their effect on the sale of automobiles in this country; questions about energy that will certainly have an effect; questions on tax structure; questions on imports and exports–the effect of the importation of foreign automobiles on their industry and the employees.

What I have just said about automobiles in just one minute, I could say for each and every industry. It is a mistake to identify unionism and collective bargaining only with what goes on at the local level in terms of trying to keep up on the economic treadmill in developing an agreement. Yes, we must have that. Yes, that's why people decide to vote for a union and to engage in collective bargaining at a local level. But not to see that this ultimately forms the basis of state and national organizations that pursue a much broader level of interests, not only of the employees but of the institutions involved, is to miss the basic meaning of organization.

### Specific Instances

Now, I can cite from my own recent experience some rather interesting examples.

Last year the city of Cleveland was about to go under. The teachers had not received a salary increase for some time and so they went out on strike. I am sure that the teachers who joined the Cleveland Teachers Union last year and the year before and twenty years ago did so because they didn't like their salaries, or the Board of Education or the Superintendent of Schools or the principal, or something like that. That's why they joined. I think you might find one in a hundred or one in five hundred who had some other, ideological, broad vision–some other reason for joining the union. Well, there they were, the city on the verge of bankruptcy and the teachers out on strike.

Now it happened some months before that the leaders of that union called me in Washington and said: "Al, what are we doing in Washington about the bankruptcy of the Penn Central Railroad? As you know Penn Central's gone bankrupt and every city that has a Penn Central station or tracks in it is owed back taxes by the Railroad. Right now the Congress of the United States is helping to reorganize it. If we can get something favorable from Congress so that the taxes are paid back quickly or at least so that they remain a strong obligation, each of our cities will be able either to have the money or to issue bonds on the basis of those obligations, and this will provide the money."

So I immediately reached my legislative people and they went to work in Congress trying to nail down the monies from the Penn Central Railroad. Along came the Cleveland strike, and the settlement was based on bonds issued in the light of future monies coming from Penn Central taxes which had been worked on in Washington, D.C. It had to be approved by the legislative leaders and the governor. And the fight isn't over yet, because they're talking about not paying the money.

In New York City last year, Mayor Koch decided he was going to make a stand against all the public employee unions, against the City University, and so on. Why did the Mayor of the City of New York finally have to enter into agreements with the employees in the city? Well, because the employees were all affiliated with national organizations, and the national organizations were able to convince the administration in Washington that it would be unwise for the federal government to extend loan guarantees for New York City as long as those labor contracts had not been approved. The federal government, the President of the United States and the Secretary of the Treasury said, "We will not provide these loan guarantees until the contracts are in place so that we can go before the Congress and say that the labor issues are settled and the monies that the federal government will now provide will be used for the normal operations of the city."

### The Attack on Higher Education

I have talked about specific bargaining issues, but I want to come now to the broader issue. Aaron Levenstein made the point that higher education is in great trouble. We have to start with the great trouble of higher education. We know about the birth rate and declining enrollments. We know about the difference, in crass economic terms, between the value of the degree when one percent of the population attends and when higher education is opened up so that much greater opportunity is provided for every one to attend.

We see a host of attacks by the federal government based on efforts to fulfill other objectives that result in the lowering of standards. We see attacks on the whole concept of career education. We are even told that one doesn't need higher education; that all there really is to education is either learning from experience or getting some craft skills from other people who already have those skills; that higher education is irrelevant–that you really don't learn anything; that there is no relationship between jobs and what one gets in colleges and universities. So that in addition to the economic problems in terms of birth rate and the value of the degree, we now have an intellectual attack on the very values and standards of higher education.

In addition, we have a tremendous economic crisis that is not going to be temporary. For the first time in the history of our country, we have the likelihood that the standard of living will actually decline. Given the energy situation and given the feeling now of weakness in our country–we didn't stand up in Angola and Mozambique and Afghanistan and Iran, etc.–and the analysis that the Russians are winning in the arms race, there is practically no question that the next decade or two will see tremendous decreases in public consumption. There will be tremendous shifts of public treasury money into investment in the military because of a feeling that this may be a pre-war situation.

Given that combination, we get a national drive for Proposition 13, but when people, in real terms, are getting less and less each year, they have to ask themselves questions: "What do I want to give up? Do I want to have a smaller house? Do I want to buy cheaper clothing? Do I want to give up my vacation? What is it that I'm going to give up?" And among the things on the checklist of what people are asked to give up are all forms of higher education, public schools, libraries, parks.

### The Future of Higher Education

Now there is another force out there–the organization of elementary and secondary school teachers in this country, almost one hundred percent organization, several million. They are very powerful–both the National Education Association and the American Federation of Teachers. They have instant access. Bob Chanin picks up the phone or Terry Herndon or I do. We want to talk to the President, the Vice President, appropriate cabinet members. The fact that we have millions of people organized, that they engage in political action, that they give money, that they work in political campaigns at the state and local levels, provides instant access. There is tremendous political sensitivity to these organizations.

I want to underscore another factor. If every one else is organized and if elementary and secondary school people are organized and other public employees are organized, and health care people are organized and if the only group of people in this country who are part of a major institution that costs a lot of money are unorganized, what will happen to them as our resources shrink? If the only group of people who are not organized are those in higher education, do I have to spell out what this will mean in colleges and universities in the next twenty years?

I am not talking about what your next contract is going to be or whether you feel there's collegiality. The question of collegiality, the question of whether you want to have confrontation or cooperation with the local administration–these are totally irrelevant in the current political, social and economic context of the United States in terms of the future of higher education. We are about to engage in a tough fight for our resources–resources that are resented by almost everyone else. Consider the fellow who is paying taxes, whether directly for a city or state university or a community college, or indirectly through various appropriations to private education. Try to explain to him the workload of a faculty member in college as compared to a person who works in a factory.

This leads me to my final point. There really isn't any alternative; you have to organize. It seems to me that the only question really is whether people in higher education in this country are going to organize as an independent higher education group or whether they're going to be affiliated and part of something else. That's the real alternative–not whether there's going to be organization.

Collective bargaining at the local level is the means for organizing people to deal with their own problems at the local level, but more important is the building of a strong state and national force to deal with the political and economic problems that the members of the profession and their institutions are about to face.

For example, New York State United Teachers represents 200,000 teachers in districts throughout the state. Even if you had every single person in higher education in the state in their own organization, how would they compare in muscle with the power of the 200,000 in NYSUT if there were competition? How would you prevent the elementary and secondary school teachers and others from going for the jugular and demanding higher education's money for their own institutions? Unless all are part of one organization, the result would be like stealing from the elementary school teacher to give it to the high school teacher or from the high school teacher to give it to the guidance counselor. We are all part of one organization.

### The Political Struggle

Finally, I would like to note that this analysis is not far from the motivating reasons for the original formation of the Teachers Union by people like John Dewey, back toward the end of World War I. One might hesitate to talk about John Dewey in the presence of an expert like Sidney Hook, but as I look back at some of the documents of those early days, I recall that Dewey was fond of shocking teachers and professors by saying that they should not ignore their own economic well-being and that they had the same right to be concerned about their economic perks as anybody else. He noted that teachers in elementary and secondary schools are teachers of the children of the working classes, and that if the teachers wanted to work effectively with those children they had to have some identification with the struggles and aspirations of their families, and that therefore the teachers should become a part of the trade union movement.

Today higher education is not the only major institution in this country that's in trouble, but it will be in much greater trouble in the next few years. What will happen in higher education will be decided on a battlefield that will be largely political, determining the allocation of public resources.

But I don't want to speak about this only in terms of power. Teachers in higher education happen to have the best possible argument for a greater share of the nation's resources in the near future. We are no longer a farming nation; that's not where our people are working. Industry now falls into two categories. There's industry that can be automated; it doesn't employ too many people. And there's industry that's labor intensive. If it's labor intensive, it moves to Hong Kong or Taiwan or Korea or Yugoslavia. But what is it that continues to make this nation a wealthy and prosperous and powerful leader? It is our technology, our brain power, our computers. It is the kind of thing that only higher education can provide.

It is not just a matter of brute power that will have to be exercised to get a fair share and a proper share. But without the power, the arguments won't mean very much.